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MINNESOTA REPORTS

VOL. 139

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF MINNESOTA

DECEMBER 14, 1917—APRIL 5, 1918

HENRY BURLEIGH WENZELL
REPORTER

KEEFE-DAVIDSON CO. SAINT PAUL 1918

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SECRETARY OF THE STATE OF MINNESOTA, IN TRUST FOR THE BENEFIT OF THE

People of Said State

(139 M.)

DEC 19 1918

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OF

THE SUPREME COURT OF MINNESOTA

DURING THE TIME OF THESE REPORTS

Hon. CALVIN L. BROWN, Chief Justice

Hon. GEORGE L. BUNN

Hon. ANDREW HOLT

Hon. OSCAR HALLAM

Hon. JAMES H. QUINN

COMMISSIONERS appointed under Laws 1913, p. 53, c. 62

Hon. MYRON D. TAYLOR Hon. HOMER B. DIBELL

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ATTORNEYS GENERAL

Hon. LYNDON A. SMITH¹ Hon. CLIFFORD L. HILTON²

1Died March 5, 1918. 2Appointed March 8, 1918, to fill the vacancy caused by the death of Attorney General Smith.

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NOTE

By G. S. 1913, § 137, the reporter is required to report all cases decided by the court.

Pursuant to G. S. 1913, § 123, the headnote in each case is prepared by the justice or commissioner writing the opinion, except where otherwise noted.

With a few exceptions the cases are reported in the order of their decision. The date of the decision follows the title of each case. The numbers given below the date indicate the number of the case in the files of the clerk of court.

As required by G. S. 1913, § 137, when any Minnesota case has been printed in the periodical known as "The Northwestern Reporter," and is cited in any opinion in this volume, a reference to the book and page of that periodical where such case appears has been inserted in such opinion. A similar citation for each opinion in this volume has been given in a footnote.

In citations from the first twenty volumes of the Minnesota Reports the page of the original edition is given, preceded by the corresponding page of the edition by Chief Justice Gilfillan.

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BY ORDERS MADE IN OPEN COURT, THE OPINIONS WRITTEN BY THE COMMISSIONERS AND REPORTED IN THIS VOLUME WERE ADOPTED AS THE OPINIONS OF THE COURT BEFORE THEY WERE FILED, AND HAVE THE SAME FORCE AND EFFECT AS THOUGH WRITTEN BY A JUSTICE OF THE COURT.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MINNESOTA

MERRILL, COWLES & COMPANY v. S. W. SHAW & BROTHER.

February 2, 1856.

No. 81 Territorial.

[Reporter's note. The report of this case in the original edition (1 Minn. 287), summarizes the pleadings and points made by the respective parties, but states that no opinion was to be found in the file. See also 1 Minn. (Gil.) 228. The opinion, having recently been discovered to be in the file, is now printed for the first time. It is not signed, but it is in the handwriting of Chatfield, J.]

Court — jurisdiction — process — change of venue — construction of statute.

Action in 1855 on a promissory note. Answer set up that neither of defendants resided in the county in which the action was brought or had property in that county subject to attachment, while one of the defendants resided in another county. Plaintiffs demurred to the answer and appealed from an order overruling their demurrer. *Held*:

- (1) Process may be served by the proper officer anywhere in the territory of Minnesota and after answer to the merits the court has jurisdiction both of the subject matter and of the parties.
- (2) The place of trial selected by plaintiff is indicated by the venue of the complaint, but the court may change the place of trial on the application of all the defendants who answer. R. S. 1851, p. 334, § 43.

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The primary object of this statute was to protect defendants against the oppression of plaintiffs. But that purpose will not justify construing the clause in section 41, "the action must be tried in the county in which the parties" reside, as an absolute and infiexible mandate so as to take away from the court jurisdiction to change the place of trial when it has jurisdiction of the subject matter and of the parties.¹

(3) Under this section 43 the answer confers upon the court jurisdiction over the place of trial of the action, but to obtain such change the defendants who answer must make application to the court by motion for an order changing the place of trial. [Reporter.]

Action in the district court for Ramsey county to recover \$1,296.60 on a promissory note. Plaintiffs demurred to the answer. The substance of that part demurred to is given in the second paragraph of the opinion. The demurrer was overruled, Sherburne, J. From the order overruling the demurrer, plaintiffs appealed. Reversed.

Rice, Hollinshead & Becker, for appellants.

D. A. Secombe, for respondent.

CHATFIELD, J.

This case is in this court upon an appeal from an order of the district court disallowing a demurrer to the defendants' answer.

The defendants, by answer allege, as an objection in the nature of a plea to the jurisdiction of the district court, that neither of the parties to this action resided in the county of Ramsey (the county designated in the complaint) at the time of the commencement of the action, and that neither of the defendants had any property therein liable to attachment and that one of the defendants did then reside in the county of Benton in this territory. To this answer the plaintiff demurred and the district court disallowed and overruled the demurrer.

I do not think the facts alleged in the answer constitute any valid objection to the jurisdiction of the district court. The subject matter of the action (a promissory note) was clearly within the jurisdiction of the district court. There can be no doubt but the court had juris-

¹[By change of statute, objection to the place of trial designated in the complaint, cannot now be taken by demurrer. Gill v. Bradley, 21 Minn. 15.]

diction of the process, nor but that the service of the process gave the court jurisdiction of the persons of the defendants. It was on the argument conceded by the counsel for the defendants that process ad respondendum of the district court may be served by the proper officer anywhere in the territory, and the position is unquestionable without the concession. And beside, the defendants appeared and answered to the merits. The district court had therefore acquired full and complete jurisdiction of the subject matter of the action and of all the parties to it. The whole question arising on the demurrer consequently rests upon the statute regulating the place of trial.

The place of trial selected by the plaintiff is indicated to the defendant by the name of the county designated in the entitling of the complaint, as required by the statute. R. S. 1851, 337, § 60, subd. 1.

The statute (R. S. 1851, 334, § 41), provides that in cases like this "the action must be tried in the county in which the parties or one of them reside at the commencement of the action * * * subject however to the power of the court to change the place of trial as provided in section forty-three" of the same statute. That section provides among other things that "the court may change the place of trial on the application of all the defendants who answer * * * when the county designated * * * in the complaint is not the proper county;" that is, when none of the parties reside in such county at the time of the commencement of the action, and some one at least of the parties does at such time reside in the territory and when none of the defendants have property in such county liable to attachment.

The principal difficulty in construing these provisions of the statute arises out of the positive term used in section 41—"the action must be tried," etc.

In construing statutes, all the provisions relating to the same subject must be considered together and with reference to each other, and also with reference to the effect which each provision was designed to secure. Each and every provision must have its designed effect if possible without abrogating the designed effect of some other more important and controlling provision.

The primary and controlling object to be secured by the provisions of the statute regulating the place of trial in transitory actions, was

manifestly to protect defendants against the oppressions which plaintiffs might otherwise maliciously or capriciously practice upon them through the general jurisdiction of the district courts. That object was designed to be and was secured by placing in the possession of defendants, who by answer disclose defenses rendering a trial necessary, the power to control the place of trial so far as to bring it to a "proper county."

Such being the design and purpose of the statute, ought the word "must" in section 41 to be construed as an absolute and inflexible mandate upon the court and the parties, so as to put the case, situated as this is, beyond the power of the court or the parties to proceed any further therein? I cannot consent to such construction. It irretrievably destroys the power of the court to try a cause of which it has full and unquestionable jurisdiction. No acts or agreement of the parties however solemn or explicit could, under such construction, confer upon the court the power to try a cause out of the "proper county." If the facts making a particular county the "proper" one exist in a case it matters not whether they appear upon the record, for it is the existence, and not the disclosure, of the facts that produces the effect—determines which is the proper county, and forbids the trial of the cause elsewhere. Under such mandatory construction of the statute the trial of a cause in any other than the "proper county" would be wholly nugatory, even though the court should be without knowledge of the facts and the parties by a solemn trial waive all objection to the power of the court to try the cause, for I repeat, the power of the courts to try rests, under such construction, wholly upon the facts, and not [at?] all upon their disclosure. A judgment rendered upon a trial out of the proper county would be void for the want of authority in the court to try the cause. The verdict would be without effect and the judgment thereon void, affording no protection to anyone who might issue, take, execute or direct the execution of process to enforce it. All the proceedings upon and subsequent to the trial would be coram non judice. When offered as such protection, proof of facts dehors the record showing that the cause was not tried in the proper county, would vitiate the proceedings, and exhibit only the original elements of what in form upon the record, appeared to be res adjudicata. The mandatory construction of that clause of the statute leads inevitably to such conclusions, and the consequences liable to result from such construction are to my mind too startling to be tolerated, unless the language of the clause inperatively requires it, and I do not think it does.

The last clause of the same section (41) expressly provides that a case, situated like this, is "subject to the power of the court to change the place of trial, as provided in section forty three." This clause plainly and directly concedes that a case thus situated is under the jurisdiction of the court, for the court could not exercise the power to change the place of trial in a case not within and subject to its jurisdiction. The order making the change is certainly not a proceeding conferring jurisdiction, but itself must rest upon a pre-existing jurisdiction. 43 regulates the exercise of the power of the court to change the place of trial and limits it to the cases therein mentioned. The first and most important limit imposed by that section is applicable to all cases, in which the change may be made, and consists of the provision requiring an answer, as a prerequisite to the change. The design of this provision is palpably manifest. It cannot be of any material consequence to a defendant who has no defense to make to the action, in what county it may be pending. It is a provision regulating the proceeding in a cause and conceding the jurisdiction of the court over it. The next limit imposed by that section is the one allowing the change of place of trial to be made only upon the application of the defendant who has answered, or, in case there be more than one, then of all the defendants who have answered. This limitation, which is also equally applicable to all the causes for which such change may be made, presupposes that the proceedings in the case, to and including the answer, are regular and within the jurisdiction of the court, and by implication denies to the plaintiff the right to make any application for such change. The answer does not oust the court of its jurisdiction. It only confers upon the court power over the place of the trial of the cause.

While the statute specifies the different causes for which a change of the place of trial may be made, it indicates only one course of practice by which to bring the power of the court into operation for that purpose, and that is by application on the part of the defendants who have answered, by motion, for by the statute "an application for an order is a motion." [R. S. 1851, p. 419, § 14.] The practice to procure an

order for the change of the place of trial for the cause that "the county designated for that purpose in the complaint is not the proper county" is the same that it is when made for any other cause specified in the statute.

This construction of the statute makes all of its provisions operative and under it the defendant is enabled to secure to himself the protection which the statute was designed to afford him. He may avail himself of the benefit of the statute or not, as he may choose, and if he does not choose to do so he waives such benefit, and the action must proceed in the county where it was commenced. Any other construction of this statute would present the strange anomaly of a court without the power to proceed in a cause of which it had full and complete jurisdiction. It would allow a defendant by the simple act of interposing such an answer as the one in this case to checkmate both the court and the plaintiff and hold them in that condition for all time, unless the plaintiff should choose to voluntarily discontinue his action. would render the court powerless to proceed in the cause on the motion of the plaintiff, or to dismiss the action without the plaintiff's consent, for the statute regards the plaintiff and his action as regularly in court, and not liable to any cause for dismissal. The statute should not be so construed as to afford to the defendant any such power.

The plaintiffs' demurrer to the defendants' answer was well taken, should have been allowed, and the order disallowing the same must be reversed.

JAMES H. MADDEN v. INTERSTATE BUSINESS MEN'S ACCIDENT ASSOCIATION.¹

December 14, 1917.

No. 20,364.

Insurance — waiver of forfeiture for false representation.

A policy of accident insurance provided that the insurer might at any time cancel the policy upon a return of the unearned portion of ¹Reported in 165 N. W. 482.

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the premium paid. In the application the insured made a false representation of a character giving the insurer a right of forfeiture. After an accident the insurer, with knowledge of the false representation, canceled the policy under the provision mentioned returning the premium unearned at that time. It is held that the facts stated evidence as a matter of law a waiver of forfeiture upon the ground of the misrepresentation in the application.

Action to recover \$328.57 upon an accident insurance policy. The answer alleged false representations in the application for insurance. The case was tried in the district court for Waseca county before Childress, J., and a jury which returned a verdict for defendant. From an order denying plaintiff's motion for a new trial, he appealed. Reversed.

Moonan & Moonan, for appellant.

Robert M. Haines, Kerr, Fowler, Schmitt & Furber and Henry M. Gallagher, for respondent.

DIBELL, C.

This is an action to recover on a policy of accident insurance. There was a verdict for the defendant. The plaintiff appeals from the order denying his motion for a new trial.

In his application the plaintiff represented that he was free of a specific disease and was not deformed or crippled. The representation was material. Evidence was offered tending to show that it was untrue. The general verdict for the defendant necessarily includes a finding that a false representation was made. It is not seriously urged that the evidence does not sustain such findings. The only question important upon this appeal is whether there was evidence for the jury upon the claim of the plaintiff that the defendant waived the forfeiture resulting from the misrepresentation. The plaintiff claims that when the company, after the loss and with knowledge of the misrepresentation, canceled the policy under a provision in it authorizing a cancelation at any time upon the return of the unearned premium, it waived a forfeiture.

The policy was issued on July 31, 1914, and the accident happened on March 17, 1915. The policy contained this provision: "The association may cancel this policy at any time by written notice delivered to the insured or mailed to his last address as shown by the records

of the association, together with cash or the association's check for the unearned portion of the premium actually paid by the insured, and such cancelation shall be without prejudice to any claim orginating prior thereto." Prior to August 6, 1915, the company learned of the misrepresentation, or at least was charged with knowledge of it. On that date, acting under the provision of the policy quoted, it sent to the plaintiff its check for \$1.22, which was the amount of the premium then unearned, with a statement that it canceled the policy. The reason assigned for the cancelation was the existence of a rule of the company "requiring retirement from risk after a serious illness or disability whereby the possibility of future disablement is increased."

It is claimed by the plaintiff that this cancelation was a waiver of its right to assert a forfeiture for misrepresentation. The argument is that the act of cancelation, including a return of the premium unearned and a retention of that earned as if the policy were then in force, was a concession that valid insurance then existed.

The false representation did not make the policy absolutely void. It was voidable at the election of the company. Schreiber v. German American H. Ins. Co. 43 Minn. 367, 45 N. W. 708. This is elementary. It might choose to ratify the policy and waive the right of forfeiture. To constitute a waiver the law in this state is, though it is not so everywhere, that there need not be a new agreement or the presence of the elements of a technical estoppel. Mee v. Bankers' Life Assn. 69 Minn. 210, 72 N. W. 74. If the insurer chooses, with full knowledge of the ground of forfeiture, to consider the policy in force and makes an election accordingly it cannot insist upon a forfeiture. It has waived it. We are not concerned with the right of the company having received payment without notice of the misrepresentation to retain it and rest upon a forfeiture when sued upon the policy. That right may be admitted. Parsons, Rich & Co. v. Lane, 97 Minn. 98, 106 N. W. 485, 4 L.R.A. (N.S.) 231, 7 Ann. Cas. 1144. The plaintiff does not rest his case upon a contention to the contrary. It may be noted that the law in this state in accord with that elsewhere is that when a policy is canceled for a false representation preventing the attaching of the risk the insured is entitled to a return of the premium, unless the representation was fraudulent, in which case he is not. National Council of K. & L. of

S. v. Gerber, 131 Minn. 16, 154 N. W. 512; Taylor v. Grand Lodge A. O. U. W. 96 Minn. 441, 105 N. W. 408, 3 L.R.A.(N.S.) 114. The defendant alleged that the representation was fraudulent. The general verdict does not determine whether it was fraudulent or innocent. The cancelation was not because of a misrepresentation preventing the policy attaching. It was made by virtue of the quoted provision of the policy.

A case very closely in point upon the principle involved is New Jersey Rubber Co. v. Commercial Union Assur. Co. 64 N. J. Law, 580, 586, 46 Atl. 777. The facts were these: The defendant issued its policy to the plaintiff in the sum of \$25,000, and the plaintiff agreed to procure from other insurers policies on the same property to the amount of \$75,000 which should be concurrent and proportionate with the policy of the defendant. When the plaintiff accepted the \$25,000 policy it in effect represented that it had other concurrent and proportionate insurance to the amount of \$75,000. This was a material representation and it was false and it was a ground of forfeiture. After the loss the defendant for the first time became aware of the misrepresentation. Negotiations followed. Later the defendant gave the plaintiff notice in conformity with the terms of the policy that it would cancel the policy, and it paid the plaintiff the unearned premium, retaining the pro rata premium for valid insurance to the amount of \$25,000 from the date of the policy to the date of the cancelation. It did not assert a forfeiture for the misrepresentation. This was held to constitute a waiver and this is what the court said: "Clearly the defendant could not assert a right to the premium for valid insurance, and at the same time insist that the insurance had never been effected. By claiming and maintaining such a right, with full knowledge of all material circumstances, it unequivocally affirmed the validity of the insurance for the period covered by the premium, and definitively waived every objection on which its validity could be denied. Although, in giving notice of cancelation the defendant stated that the cancelation was made subject to the final adjustment of the claim by reason of the preceding fire, nevertheless the action of the defendant put an end to any possible denial of the contract as one of the elements in such adjustment."

In Commercial Assur. Co. v. New Jersey Rubber Co. 61 N. J. Eq. 446, 452, 49 Atl. 155, 157, the same policy was involved. This was an action in equity to reform the policy and to enjoin an action at law upon it. In referring to the cancelation the court said: "By such cancelation of its own accord, a right derived solely from the policy, which the insured was bound to accept, if it also stood by the policy, the complainant has, in my judgment, as well in equity as at law, affirmed the validity of the policy in its form at the time of cancelation, and cannot escape like consequences for this action by any appeal to different courts." This case was reversed by the court of appeals and errors in Commercial Union Assur. Co. v. New Jersey Rubber Co. 64 N. J. Eq. 338, 51 Atl. 451, but upon the point that the determination of the court in the action at law was not res adjudicate in the action to reform.

Home Fire Ins. Co. v. Kuhlman, 58 Neb. 488, 493, 78 N. W. 936, 76 Am. St. 111, is of a somewhat similar character. The insured forfeited his policy by allowing the property to become vacant. A fire loss occurred. Afterwards and with knowledge of the right of forfeiture the insurer canceled the policy and returned the unearned premium. ferring to the right of the company to cancel because of the vacancy, and the effect of its cancelation after loss without avoiding the policy for the violation of its terms and from the date of such violation the court said: "So in this case, the defendant had a right, on being informed that a condition of the policy had been broken, to treat the policy as of no effect from the date of the breach. If there was a forfeiture of which the defendant had taken advantage then there was no contract to cancel for it had already ceased to exist. It was dead. * * * And if the company had taken advantage of the forfeiture, there was no unearned premium which the plaintiff-was entitled to receive. * * * If the defendant had not waived its right to claim a forfeiture, it is * * * difficult to understand its insistence that there was an unearned premium. * * * It is equally incomprehensible why the company should so persistently seek to rescind the contract if, by reason of the forfeiture, it was already lifeless and incapable of rescission."

What the defendant did in the New Jersey case, and substantially the same was done in the Nebraska case, was to proceed in its cancelation as if the policy were valid until the date of cancelation, and therefore at and subsequent to the loss, disregarding the misrepresentation which it might have used as a basis of forfeiture, and canceling in accordance with the terms of the provision of the policy. That is what was done here. The company's conduct was a conclusive concession that the policy was in force, and that no right of forfeiture was claimed, when the cancelation was made. There must be a new trial and upon such evidence as is now before us the jury should be instructed that the policy was in force at the time of the accident.

For the purposes of this appeal it is not necessary to consider the waiver claimed to result from the defendant's insisting after the accident and with knowledge of the misrepresentation upon an examination of the plaintiff's person in accordance with the terms of the policy.

Order reversed.

E. P. MOORHEAD v. MINNEAPOLIS SEED COMPANY. JOSEPHINE MATTHEWS v. SAME.¹

December 14, 1917.

No. 20,499.

Sale — oral warranty — printed disclaimer.

1. The evidence sustains a finding of the jury that in the course of negotiations with the plaintiffs the vice president and general manager of the defendant corporation made an oral warranty of the germinating power of seed-wheat sold them; and the effect of such warranty was not as a matter of law annulled by printed disclaimers of warranty in the letter of confirmation, invoice and shipping tags, though the contract was oral and within the statute of frauds.

Corporation — authority of general manager to make warranty.

2. The vice president and general manager of the defendant, who had general charge of its office and plant, had authority to bind it by a warranty, though the making of warranties on the sale of seed-grain was contrary to the custom of the trade.

1Reported in 165 N. W. 484.

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Sale — measure of damages for breach of warranty.

3. Where there is an entire failure of germination, and therefore no crop, the measure of damages for the breach of warranty of germination is the amount paid for the seed, plus the cost of planting, plus the value of the use of the land for the cropping season, less the value of its use for a proper purpose to which it might reasonably have been put upon the ascertainment of a failure of germination, and not the value of the crop which would have been raised if the seed had been true to warranty less the cost of planting and producing.

Same—quaere, whether finding is sustained by evidence.

4. Whether the evidence sustains a finding that there was a breach of warranty in respect of the germinating power of the seed is questioned but not decided.

Two actions in the district court for Hennepin county to recover \$6,343.40 and \$746.40, respectively, for breach of warranty. The answers alleged that if, on or about the time alleged in the complaint any wheat was sold and delivered by defendant to plaintiff and was by him planted and failed to germinate and grow, such failure was wholly caused by the wilful or careless and negligent acts, omissions and conduct of plaintiff, his agent, tenant and representative in choosing the season and time of planting such wheat, and in selecting, cultivating and preparing the soil for planting the same, and in handling, treating and preparing said wheat for planting, after its delivery to and before its planting by him, and also by reason of the nature and quality of the soil where planted—the same being unfit for the production of wheat—and the conditions of the atmosphere and weather. The cases were tried before Leary, J., who denied defendant's motions for a directed verdict in each case, and a jury which returned verdicts for \$2,839.14 and \$408.30, respectively. From an order denying its motions for judgment notwithstanding the verdicts or for new trials, defendant appealed. Reversed.

Koon, Whelan & Hempstead, for appellant.

George C. Stiles and D. C. Edwards, for respondents.

DIBELL, C.

These two actions to recover for the breach of an express warranty of the germinating power of seed-wheat were tried together and there were verdicts for the plaintiffs. The defendant appeals from the order denying its alternative motion for judgment or a new trial.

The questions are these:

- (1) Whether the evidence sustains a finding that an express warranty on the sale of seed-wheat was made on behalf of the defendant by its vice president and general manager; and in connection with this the effect of disclaimers of warranty printed on the letter-head confirming the sale, on the invoice, and on the shipping tags.
- (2) Whether, in view of the custom not to warrant the germinating power of seed sold, the vice president and general manager had authority to bind the defendant by a warranty.
- (3) Whether the measure of damages, there being an entire failure of germination and a consequent total loss of crop, is the value of the crop which would have been raised had the seed been true to warranty, less the cost of planting and producing, or the cost of the seed, plus the value of the use of the land, plus expenses incurred, less the value of the use of the land after the failure of germination.
- (4) Whether the evidence sustains a finding that the seed was lacking in germinating power.
- 1. About April 1, 1915, the plaintiffs entered into negotiations with the defendant through R. M. Johnston, its vice president and general manager, for the purchase of blue stem seed-wheat for the seeding of their farms near Anamoose, North Dakota. Their testimony is that they told him that they had had trouble with germination, and inquired whether he would guarantee the seed which he proposed selling, and that he then warranted it to be of 99 per cent germinating power. By common understanding the question of purchase was left open and was shortly afterwards closed over the telephone by an acceptance by the plaintiffs. By letter of April 6, the sale was confirmed in the usual way. At the top of the letter of confirmation was printed the following:

"We give no warranty, expressed or implied, as to description, quality, productiveness, or any other matter, of any seeds we send out, and we will not in any way be responsible for the crop. If purchaser does not accept the seeds on these terms, they are to be returned at once. * * * No complaints received after ten days from receipt of goods."

The wheat was sold f. o. b. and was delivered to the plaintiffs on April

6, on board a Soo car, the invoice was dated on that day, the bill of lading was issued to one of the plaintiffs on April 7, they prepaid the freight, the price was paid the defendant probably on April 8, and the wheat reached Anamoose on April 13 and was accepted by the tenants of the plaintiffs and used in seeding. The invoice contained a printed disclaimer of warranty similar to that on the letter of confirmation and a like disclaimer was on the shipping tags on the reverse side of the address.

Johnston denies that a guaranty was asked or given, but says that there was some talk about germinating tests. No warranty was given in the letter of confirmation, but the results of germination tests were stated and so far as appears were truthful. It is the contention of the defendant that taking the evidence as a whole it is insufficient to sustain a finding of a warranty; and it relies considerably upon the disclaimers of warranty. The contract of sale was oral and within the statute of frauds and invalid until acceptance of the wheat or payment. Payment and acceptance pursuant to the contract satisfied the statute. Scott v. T. W. Stevenson Co. 130 Minn. 151, 153 N. W. 316; Perkins v. Thorson, 50 Minn. 85, 52 N. W. 272. Until payment or acceptance the contract was not complete or binding, a new term might be eliminated at the will of either.

The defendant cites on the question of disclaimers of warranty a line of cases of which Ross v. Northrup, 156 Wis. 327, 144 N. W. 1124; Blizzard Bros. v. Growers' C. Co. 152 Iowa, 257, 132 N. W. 66; and Seattle Seed Co. v. Fujimori, 79 Wash. 123, 139 Pac. 866, may be taken as typical. Some of the cases of this character bear upon the question of an implied warranty that what is sold is true to variety or trade-name. Here there is no question of implied warranty. The cases do not go so far as to hold that if an express warranty is made its effect is obviated by the use of letters or invoices or shipping tags on which disclaimers are printed. We would not expect such a holding. These disclaimers are evidentiary in support of the defendant's contention. That far they should have effect. They are not conclusive. If a warranty was actually made, during the negotiations, and not withdrawn or modified, it should be given effect irrespective of the printed disclaimers. See Edgar v. Joseph Breck & Sons, 172 Mass. 581, 52 N. E. 1083.

The evidence in support of the warranty is not particularly convincing. There is much to indicate that the parties were talking about germinating tests and not of a warranty of germinating power. However, there is evidence that the plaintiffs wanted to buy a warranty as well as seed and that Johnston undertook to promise germinating results. The jury might well enough have found that there was no such promise, but instead they found that there was. We are dealing with a finding of the jury approved by the trial judge, who was in much better position than we are for judging testimony, and not with what we may think from a reading of the evidence might as well or better have been found. We hold that the evidence sustains the finding.

2. The next question is upon the authority of Johnston to make a guaranty binding upon his corporation.

The argument of defendant is that when a custom of the trade not to warrant is shown, and here there was evidence of such a custom which for the purposes of this appeal we assume to be conclusive, authority to warrant cannot be implied. The theory is that implied authority in a selling agent to warrant comes from the fact that sales in the particular trade are commonly made with warranty and when such is not the custom authority cannot be implied. Upton v. Suffolk County Mills, 11 Cush. 586, 59 Am. Dec. 163; Wait v. Borne, 123 N. Y. 592, 25 N. E. 1053; Bierman v. City Mills Co. 151 N. Y. 482, 45 N. E. 856, 37 L.R.A. 799, 56 Am. St. 635; Waupaca Electric Light & Ry. Co. v. Milwaukee Elec. Ry. & L. Co. 112 Wis. 469, 88 N. W. 308; 2 C. J. 601; 31 Cyc. 1353; 30 Am. & Eng. Enc. (2d ed.) 165; Williston, Sales, § 445; 2 Mechem, Sales, § 1281, et seq.

Johnston was the vice president of the corporation and its general manager. He was in charge of its offices and plant. It does not appear that any other executive officer was about. So far as can be seen one dealing with him was as near the corporate entity as he could get. Unless a purchaser could take a warranty from him he could get none from anyone. There was somewhere corporate power to warrant. Conceding the rule of law claimed, and that a custom not to warrant was conclusively proved, we are of the opinion that a vice president and general manager, having such charge of the company's operations and such general

authority as is shown, has implied authority to make a warranty binding the corporation.

3. There was no germination and the failure of crop was total. The court held that the measure of damages was the value of the crop which would have been raised had the seed been true to warranty, less the expense of planting and producing. The defendant contends that the measure, where the loss is total, should be based upon the value of the use of the land of which the owner is deprived, plus the value of seed-grain used and expenses incurred, and less any value in the use of the land after the failure of the seed to germinate.

Where there is a partial crop, or a crop of different variety than that promised by the warranty, the proper measure is the difference in value between the crop raised and the crop which would have been raised had the seed responded to the warranty. Randall v. Raper, Ellis, B. & E. 84; Wolcott, Johnson & Co. v. Mount, 36 N. J. Law, 262, 13 Am. Rep. 438; Passinger v. Thorburn, 34 N. Y. 634, 90 Am. Dec. 753; Landreth v. Wyckoff, 67 App. Div. 145, 73 N. Y. Supp. 388; White v. Miller, 71 N. Y. 118, 27 Am. Rep. 13; Edgar v. Joseph Breck & Sons, 172 Mass. 581, 52 N. E. 1083; Dunn v. Bushnell, 63 Neb. 568, 88 N. W. 693, 93 Am. St. 474; Moody v. Peirano, 4 Cal. App. 411, 88 Pac. 380; Buckbee v. P. Hohenadel, Jr. Co. 224 Fed. 14, 139 C. C. A. 478, L.R.A. 1916C, 1001; Grafton-Stamps Drug Co. v. Williams, 105 Miss. 296, 62 South. 273; Cline v. Mock, 150 Mo. App. 431, 131 S. W. 710; American Warehouse Co. v. Ray (Tex. Civ. App.) 150 S. W. 763.

Where there has been no germination it has been held that the damages should be measured by the cost of the seed, plus the cost of planting, plus the value of the use of the land, less any value in the use remaining at the time the seed failed to germinate. Reiger v. Worth, 127 N. C. 230, 37 S. E. 217, 52 L.R.A. 362, 80 Am. St. 798.

It is manifest that where there is a partial crop, and that is the usual case, the first measure is the true one. There is no other. Some of the cases involving partial failures and applying the first measure distinctly state that the second measure is the true one when the loss is total. Vaughn's Seed Store v. Stringfellow, 56 Fla. 708, 48 South. 410; Ford v. Farmers' Exchange, 136 Tenn. 287, 189 S. W. 368, L.R.A. 1917B, 1106. Still there are cases applying rather as a matter of course and

without discussion the first measure when the failure is total. G. B. Shaw & Co. v. Smith, 45 Kan. 334, 25 Pac. 886, 11 L.R.A. 681; Crutcher & Co. v. Elliott, 13 Ky. Law R. 592; Van Wyck v. Allen, 69 N. Y. 61, 25 Am. Rep. 136; Depew v. Peck Hardware Co. 121 App. Div. 28, 105 N. Y. Supp. 390. The question does not often arise and is hardly considered in the cases cited. It is considered in treaties with scant recognition of the distinction and there are few cases illustrating it. Williston, Sales, § 614; 2 Mechem, Sales, § 1827, et seq.; 1 Sutherland, Damages (4th ed.) § 61; 1 Sedgwick, Damages (9th ed.) § 191; 2 Sedgwick, Damages (9th ed.) § 768; 3 Joyce, Damages, § 1707; 35 Cyc. 479; 30 Am. & Eng. Enc. (2d ed.) 219; 43 Cent. Dig. Sales, § 1294; 17 Dec. Dig. Id. § 442 (11).

Writers, so far as they meet the question at all, join in approval of the second measure stated when the failure is entire. 1 Sedgwick, Damages (9th ed.) § 191; 2 Sedgwick, Damages (9th ed.) § 768; 30 Am. & Eng. Enc. (2d ed.) 219; 35 Cyc. 479.

The object of the law is to furnish a measure which will give as near as may be actual compensation for the breach and which is free of uncertain, contingent, conjectural or speculative elements. When damages are based upon the value of the use of the land the uncertainty of amount because of uncertainty of crop results is eliminated and they may be assessed forthwith. We are of the opinion that when the failure of crop is entire, because of a failure of germination, the damages should be based on the value of the use with additions and deductions suiting the conditions of the particular case. The objection suggested by the plaintiffs that there was no fixed rental value in North Dakota is without substantial merit. There need be no market rental value. It is enough if the use value is determined and that may be found without the aid of a market value. Farmers and others qualified to testify may furnish proof of value. In Nelson v. Minneapolis & St. L. Ry. Co. 41 Minn. 131, 42 N. W. 788, Justice Mitchell, in a case involving a question of at least as great difficulty, said:

"What the law aims at is compensation; and the matter of ascertaining the rental value, or how much it has been depreciated, is a practical question, to be treated in a practical way, and to the consideration of which it is necessary to bring a little of the farmer as well as the lawyer."

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4. The defendant contends that the finding of the jury that the seed lacked germinating power is unsustained by the evidence. The situation presented is peculiar. The seed was bought for three farms, the Moorhead farm, the Mathews farm and the Roberts farm. It was put into separate sacks and those intended for each of the farms was separately designated by the shipping tags. It was shipped in one car to Anamoose. One Okert, who was the tenant for Moorhead and Mathews, hauled the seed for their farms. One Budeau, who was the tenant of Roberts, hauled the seed for the Roberts farm. Okert planted the Moorhead and Mathews farms and the seed failed to germinate. Before planting he submitted it to a formaldehyde treatment. Budeau planted his without treatment and it grew well. Altogether 475 bushels went to the Moorhead, Mathews and Roberts farms. It came, as the evidence tends to show and perhaps shows conclusively, from a mass of 752 bushels in the defendant's warehouse. The left 277 bushels. Of this amount 273 bushels were delivered at Madison Lake, Minnesota, and planted by 12 different farmers. All of it grew well. The remaining 4 bushels are not accounted for. Budeau had 5 bushels left. He let Okert have this and he planted it on the Mathews land after submitting it to the formaldehyde treatment. It grew well. The growing season and soil conditions were good. Other wheat planted by Okert and submitted to the' formaldehyde treatment grew. The seed furnished was good in appearance. It is claimed by the defendant that the formaldehyde treatment destroyed the germination. There is evidence that this treatment should be applied with some caution and that there is some danger attendant upon its use. It is difficult to understand how seed wheat of almost any kind, and especially that having the appearance of this, would fail to germinate to the extent claimed, that is, not a few per cent of it but more than 95 per cent. The formaldehyde treatment may be attended with some danger, but it is difficult to understand how its ordinary use could destroy not a small percentage of it but 95 per cent. some difficulty in saying that the evidence sustains a finding that the wheat was without germinating power. There must be a new trial for the reasons stated in paragraph 3 and we leave the question of the sufficiency of the evidence to show lack of germinating power undecided. Additional evidence may be produced at another trial. It is not at this time a case for judgment notwithstanding.

Order reversed.

STATE BANK OF WILLOW RIVER v. PAUL PANGERL AND OTHERS.1

December 14, 1917.

No. 20.576.

Bills and notes - liability of accommodation indorser.

1. In an action on a promissory note made by defendant makers at the request of the plaintiff bank to the defendant payee without consideration passing from him to them, and indorsed by the defendant payee to the plaintiff at its request and without consideration, the evidence is held to show as a matter of law that the indorsement was for the accommodation of the plaintiff and it cannot recover thereon.

Same - parol evidence of want of consideration.

2. The rule that upon the transfer of a promissory note the effect of the payee's indorsement cannot be varied by parol does not prevent the showing of want of consideration or that paper is accommodation.

Action in the district court for Pine county against Paul Pangerl, Marie Pangerl and E. C. Townsend, to recover \$352 upon a promissory note. E. C. Townsend, in his separate answer, alleged that there was no consideration for the note as between himself and the other defendants and no consideration for the indorsement to plaintiff, which facts were a known to plaintiff, and that the note was procured by the cashier of plaintiff, acting for plaintiff, and was indorsed by defendant at his request, without consideration, and upon the express agreement that the answering defendant should not be held liable thereon. The case was tried before Nethaway, J., who made findings and ordered judg-

¹Reported in 165 N. W. 479.

ment for the amount demanded. From the judgment entered pursuant to the order for judgment, E. C. Townsend appealed. Reversed.

William M. Lamson, for appellant. Ottocar Sobotka, for respondent.

DIBELL, C.

This is an action by the State Bank of Willow River against Paul Pangerl, Marie Pangerl, his wife, and E. C. Townsend upon a promissory note. There were findings and judgment for the plaintiff. The defendant Townsend appeals. The defendants Pangerl did not answer and have no defense.

1. On October 7, 1912, the Pangerls made a note to the plaintiff bank for \$1,178.60 due in six months. On March 27, 1913, the Pangerls made to Townsend a note for \$352. This note was indorsed by Townsend and is the one in suit. The facts attending its execution are about these: Peter Praxel was the cashier of the bank. A day or two before the making of the note he went to Rutledge, a few miles from Willow River, where Townsend and the Pangerls lived. He arranged either with Townsend to get the Pangerls to make a new note, or with Paul Pangerl personally. He later made out the note at the bank and sent it by mail to Townsend and the Pangerls signed it. Pangerl did not know that the note ran to Townsend. Townsend's explanation of his indorsement is that he had the note among some checks for deposit, that Praxel called in a few days and was to take the checks to the bank, and that in indorsing the checks he inadvertently indorsed the note. then refused to deliver it until Praxel gave him what he calls a "clearance." This was furnished a few days later in the form of a memorandum signed by Praxel agreeing to reimburse him if he had to pay the note and it was then delivered to Praxel for the bank and was credited upon the \$1,178.60 note. The Pangerls got the benefit of it. Townsend got nothing. It was never a subsisting obligation between him and the Pangerls. He was on it as an accommodation either for the Pangerls or for the bank. The Pangerls never heard of his connection with it until suit brought. He was not accommodating them. The evidence is conclusive that Townsend indorsed and delivered the note at the request of Praxel and as an accommodation to the bank. Townsend says

that Praxel suggested that this would avoid the necessity of getting a new note from the Pangerls. Whatever Praxel did in connection with the transaction was done for the bank. It was wholly a bank transaction. The giving of the so-called "clearance" was as much a bank act as the taking of the note. If Townsend had indorsed the note as an inducement to the bank to give the Pangerls an extension there would have been a consideration. This was not the arrangement. Why the bank wanted a note from the Pangerls for \$352, or for any amount, is a matter of conjecture. Praxel was not a witness. From the statements of counsel at the trial we take it that he is not available. Perhaps he could explain the transaction. Townsend's explanation is not very satisfactory and all of the transaction has not been explained. Upon the evidence before us the controlling fact is that Townsend's indorsement was for the bank's accommodation. He is not liable to the bank upon it.

2. Evidence of a parol contemporaneous agreement varying the effect of an indorsement made upon the sale and transfer of a promissory note is inadmissible. Giltner v. Quirk, 131 Minn. 472, 155 N. W. 760, and cases cited; 1 Dunnell, Minn. Dig. § 3368. Knoblauch v. Foglesong, 38 Minn. 352, 37 N. W. 586, is a leading case. This rule does not trench upon the equally well settled one that want of consideration and that paper was given for accommodation may be shown by parol. These two, the accommodation character of paper and want of consideration, are inseparably connected and may be shown by parol. 1 Dunnell, Minn. Dig. §§ 977, 3373; National Citizens Bank of Mankato v. Bowen, 109 Minn. 473, 124 N. W. 241; Shalleck v. Munzer, 121 Minn. 65, 140 N. W. 111; Kragnes v. Kragnes, 125 Minn. 115, 145 N. W. 785.

Judgment reversed.

GABRO LAND COMPANY v. ARTHUR A. MICHAUD AND OTHERS.¹

December 14, 1917.

No. 20.577.

Tax sale - entry in copy judgment book - construction of statute.

Section 2122, G. S. 1913, which requires the county auditor, upon making a tax sale, to set out in the copy judgment book what disposition was made at such sale of each parcel of land, does not require an entry in that book of the date of the sale.

Action in the district court for Lake county to determine adverse claims to vacant and unoccupied land. The case was tried before Cant, J., who made findings and ordered judgment in favor of plaintiff as to all of certain land. Defendant d'Autremont's motion to amend the findings of fact and conclusions of law was denied. From an order denying his motion for a new trial, defendant d'Autremont appealed. Affirmed.

Oliver S. Andresen, for appellant. Arnold & Arnold, for respondent.

HALLAM, J.

This is an action to quiet title. Plaintiff claims under a Governor's tax deed. The validity of this deed is the question in the case. Only one objection is raised. At the annual tax sale in 1911, on which the Governor's deed is founded, the property was bid in for the state. The objection raised is that the auditor did not enter the date of the sale in his copy of the tax judgment book. This book contains the only record of the tax sales which the auditor is required to make. Section 2122, G. S. 1913, is the only statute prescribing what entries the auditor shall make in this book. This section provides as follows: "Immediately after such sale the auditor shall set out in the copy judgment book what disposition was made at such sale of each parcel of land; if sold to an

1Reported in 165 N. W. 480.

actual purchaser, to whom and for what amount, and for what rate of interest; and, if bid in for the state, then so stating. * * *" Any entry required by this section must be made or the tax title founded on the sale fails. For example, this section in terms requires that if the land is bid in for the state, that fact shall be entered in this book. If such entry is not made the ensuing tax title is void. Mulvey v. Tozer, 40 Minn. 384, 42 N. W. 387; Donaldson v. Sache, 121 Minn. 367, 141 N. W. 493. There is no requirement that the date of sale be entered in the copy judgment book. It is contended, however, that since the date of sale is important in computing interest and in determining the time of expiration of the right of redemption and the amount required to redeem, and since the date of sale must be inserted in any state assignment certificate which subsequently may be issued, and since the auditor is required to keep no other record of the sale, that the requirement that he shall "set out in the copy judgment book what disposition was made at such sale of each parcel of land" must contemplate that he shall make an entry in that book of the date of sale. There is force to this argument as an argument as to the desirability of a law requiring that the date of the sale be entered in the judgment book, but we think it has little force in defining the meaning of the statute. If the auditor does enter a date of sale in this book and a certificate is issued stating a different date, the certificate prevails. McQuade v. Jaffray, 47 Minn. 326, 50 N. W. 233. We think the requirement that the auditor shall set out in this book "what disposition was made at such sale" of the land sold is not a requirement that he shall here enter the date of sale. To impose this requirement would be to add something to the statute. This we cannot do. Order affirmed.

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L. C. PEDERSEN v. CHRISTOPHER C. M. NEWTON AND OTHERS.¹

December 14, 1917.

No. 20,636.

Judgment - vacating default - finding of laches sustained.

An application made under G. S. 1913, § 7739, by one served by publication, to vacate the judgment in the action if seasonably made, is granted as a matter of right. Defendant may lose his right by laches. He must meet any charge of laches made by plaintiff, and if laches appears from his own showing his application must fail. There are facts and circumstances in this case sufficient to sustain a finding of laches on the part of the defendant in making his application to vacate the judgment against him.

Action in the district court for Pine county to determine adverse claims to vacant and unoccupied land. The case was tried before Nethaway, J., who made findings and ordered judgment in favor of plaintiff. From an order denying his motion to set aside the default judgment and to be substituted in the place of persons unknown and to be allowed to appear and defend the action, E. Avery Newton appealed. Affirmed.

Leach & Leach, for appellant.

S. G. L. Roberts, for respondent.

PER CURIAM.

This is an action to quiet title to 80 acres of land in Pine county. Christopher C. M. Newton and all other persons unknown were made defendants. Newton died in 1876, a nonresident of Minnesota, leaving a widow, two sons and a daughter, all nonresidents and residing at widely separated places. No copy of summons was mailed to or served upon any. Judgment was entered June 22, 1916. At some time after judgment, one of the sons, E. Avery Newton, learned of the judgment and, after correspondence, purchased the interest of the other heirs and

1Reported in 165 N. W. 378.

in February, 1917, made application to vacate the judgment and for leave to answer. The trial court denied the motion and defendant Newton appeals. This application was made under G. S. 1913, § 7739. This section provides as follows: "If the summons be not personally served, the defendant, on application to the court before judgment and for sufficient cause, shall be permitted to defend; and, except in an action for a divorce, the defendant, in like manner, may be permitted to defend at any time within one year after judgment, on such terms as may be just."

Under this section, where the summons is served by publication, "the defendant is entitled, upon proper application, as a matter of right, to an order vacating the judgment, and permitting a defense to be interposed." An answer setting up a good defense is a showing of "sufficient cause" within the meaning of the statute. "Such applications are not addressed to the discretion of the court," as are applications under G. S. 1913, \$ 7786. "If proper application for leave to defend be seasonably made, and be accompanied with an answer setting up a defense to the action, it is granted as a matter of right." Fifield v. Norton, 79 Minn. 264, 265, 82 N. W. 581; Lord v. Hawkins, 39 Minn. 73, 38 N. W. 689, limiting Washburn v. Sharpe, 15 Minn. 43 (63), and Frankoviz v. Smith, 35 Minn. 278, 28 N. W. 508; Wheaton Flour Mills Co. v. Welch, 122 Minn. 396, 142 N. W. 714; Doherty v. Ryan, 123 Minn. 471, 144 N. W. 140.

The party making the application "is not required * * * in the first instance, to show that he had not actual notice of the action in season to interpose his defense within the ordinary time." Frankoviz v. Smith, 35 Minn. 278, 28 N. W. 508. He may, however, be barred of his right by laches after he has notice of the entry of the judgment. Cutler v. Button, 51 Minn. 550, 53 N. W. 872; Fink v. Woods, 102 Minn. 374, 113 N. W. 909; De Laittre v. Chase, 112 Minn. 508, 128 N. W. 670. He is bound to meet any charge of laches made by plaintiff, Mueller v. McCulloch, 59 Minn. 409, 61 N. W. 455; Bogart v. Kiene, 85 Minn. 261, 88 N. W. 748, and if laches appears from his own showing, his application must fail.

The trial court must have found that defendant was guilty of laches and must have denied relief on that ground. In determining whether the defendant is barred by laches, a large discretion must be reposed in the trial court. Mueller v. McCulloch, 59 Minn. 409, 61 N. W. 455. The facts bearing on this question are as follows:

This land was patented to Christopher C. M. Newton March 1, 1872. Neither he nor his family ever paid any taxes upon it. They abandoned the land, so far as vacant land can be abandoned, and it was sold for taxes in 1881 and the purchaser and his grantees have since paid the taxes. Defendant states in his affidavit "that prior to the entry of judgment" he "had no notice or knowledge * * of the commencement or pendency of said action." He does not state when he received notice, but alleges that upon receipt of notice he stated his case to an attorney who advised him that the heirs "could open up the said judgment and file an answer therein at any time within one year after the entering of the judgment," that he immediately got in touch with the other heirs, "which necessarily was a slow process seeing that these heirs were so affiant and from each other," and that he obtained far from quitclaim deeds from them of their interest in the premises and thereupon made this application. Defendant resides in Los Angeles and the other heirs, one in Oregon City, Oregon, one in Des Moines, one in Philadelphia. One of them stated in an affidavit that "prior to the month of January, 1917," he had no notice of the action or of the judgment. This application was made February 20, 1917, and notice of it was served February 8, 1917. A majority of the court are of the opinion that these facts justify a finding of laches in making the application and that the order appealed from should be affirmed.

Order affirmed.

ARCADE INVESTMENT COMPANY v. JOSEPHINE HAWLEY.1

December 14, 1917.

No. 20,659.

Landlord and tenant-rescission of lease.

1. Even if it be conceded that the jury might properly find from the evidence that the tenant was induced to execute the lease because of a fraudulent promise of the landlord that no restaurant would be permitted in the building, the tenant by paying rent after a restaurant was installed precluded herself from rescinding the lease, for with full knowledge of the alleged fraud she recognized the binding force of the contract.

Fire escapes—statute inapplicable.

2. The restaurant, conducted in a room on the third floor of a four story building wherein there are no sleeping rooms, does not come within the operation of section 5120, G. S. 1913, requiring the building to be equipped with fire escapes or facilities for the prevention of fires.

From a judgment in justice court in favor of defendant, plaintiff appealed to the municipal court of St. Paul where the appeal was heard before Boerner, J., and a jury which returned a verdict in favor of defendant. From an order denying its motion for a new trial, plaintiff appealed. Reversed.

A. E. Horn, for appellant.

Charles E. Bowen and R. F. Schroeder, for respondent.

HOLT, J.

In this action to recover the rent for the last month of a one year lease the defenses were: First, that plaintiff by means of fraudulent representations procured defendant's signature to the lease; and, second, that the building wherein were the demised rooms was not equipped with the facilities prescribed by law for protection against fires. Both defenses were submitted to the jury. The verdict was in defendant's favor and plaintiff appeals from the order denying a new trial.

1Reported in 165 N. W. 477.

The short facts are these: Lowry Annex is a four story business building in the city of St. Paul. The second, third and fourth stories are rented to a number of tenants for office and business purposes. There are no sleeping rooms in any part of the building. On July 22, 1915, defendant was a tenant therein, occupying rooms on the fourth floor as a dressmaking shop. She desired to move to the third floor. Thereupon a written lease was executed by the parties, under the terms of which defendant was to occupy two rooms on that floor for her business for one year, beginning September 1, 1915, and paying to plaintiff as rent the sum of \$60 per month in advance. She took possession under this lease and paid the stipulated rent to July 31, 1916, when she vacated. About May 1, 1916, a restaurant was established in a room across the hall from defendant's dressmaking shop, notwithstanding the promise made by plaintiff to defendant, as she claims, that if she would execute the lease no restaurant would be permitted in the building.

The theory of this first defense is that plaintiff, to induce defendant to execute the lease, falsely made the promise to keep restaurants out of the building, its intention being at the time the promise was given to not keep it, thus bringing the case within such decisions as Albitz v. Minneapolis & Pac. Ry. Co. 40 Minn. 476, 42 N. W. 394; McElrath v. Electric Investments Co. 114 Minn. 358, 131 N. W. 380; and Edward Thompson Co. v. Schroeder, 131 Minn. 125, 154 N. W. 792. It is not at all clear that the evidence would justify the jury in finding the existence of a fraudulent intent to violate the given promise. If, at the time of making the promise, the intention was to abide by it, the subsequent breach would not furnish the basis for a rescission of the lease. But, even conceding the evidence to justify an inference of the existence of a fraudulent intent at the time the promise was given not to keep it, we think defendant, by paying rent after the restaurant was installed, precluded herself from rescinding. She testified that the restaurant was opened about May 1, 1916, so that she likely knew when the rent was paid for that month that plaintiff did not mean to keep its promise, but, at any rate, she paid the June rent after the restaurant had been running a month to her certain knowledge. Not until late in June or, more likely, in July did she complain of its existence. It is elementary that the one who desires to rescind a contract, which he was induced to enter through the other party's fraud, must act promptly upon discovery of the fraud. If with knowledge of the deception he recognizes the binding force of the contract, or takes advantage of its benefits, he cannot rescind. Crooks v. Nippolt, 44 Minn. 239, 46 N. W. 349; Parsons v. McKinley, 56 Minn. 464, 57 N. W. 1134.

The court left the jury to determine whether Lowry Annex was equipped with the safety devices against fires prescribed by chapter 569, p. 840, Laws 1913. In our opinion that statute is not applicable. This building is not covered by sections 6 and 7 thereof (sections 5118 and 5119, G. S. 1913), for those apply to hotels and restaurants having 10 or more sleeping rooms. The scope of section 8 (section 5120), the one read to the jury by the court, insofar as it relates to safety equipment against fires is thus expressed: "That within six months after the passage of this act every hotel and restaurant in this state, occupied and used as such, and which is more than three stories high shall be equipped," etc. No part of Lowry Annex above the third floor was occupied or used as a restaurant. Therefore this restaurant being on the third floor, was not more than three stories high. It cannot for a moment be supposed that the legislature intended that, if a few rooms were rented for a restaurant on the first floor of a building of four or more stories, all the stories thereof must be equipped with the facilities for fire prevention and escape prescribed by this section. There was no violation by the lessor of a penal statute shown whereby the lease could be avoided. The doctrine of Leuthold v. Stickney, 116 Minn. 299, 133 N. W. 856, 39 L. R. A. (N. S.) 231, Ann. Cas. 1913B, 405, has no application to the facts herein.

The evidence failed to establish any defense, and a new trial must be had.

Order reversed.

STATE EX REL. ALBERT DICKINSON COMPANY AND OTHERS v. DISTRICT COURT OF HENNEPIN COUNTY AND ANOTHER.1

December 14, 1917.

No. 20.737.

Workmen's Compensation Act — blood poisoning from scratch on hand.

The evidence stated in the opinion is held sufficient to sustain a finding that a deceased workman died from blood poisoning as a result of an injury arising out of and in the course of his employment.

Upon the relation of Albert Dickinson Company and another the supreme court granted its writ of certiorari to review the proceedings in the district Court for Hennepin County, Dickinson, J., under the Workmen's Compensation Act brought by Mary Cora Rackman, as widow of Robert G. Rackman, employee, against The Albert Dickinson Company, employer, and Fidelity & Casualty Company, insurer. Affirmed.

Briggs, Thygeson & Everall and Charles H. Weyl, for relators.

A. A. Tenner and John A. Nordin, for respondents.

HALLAM, J.

On April 3, 1916, Robert G. Rackman was employed by the Albert Dickinson Company loading and unloading bags into and from box cars. He quit at 9:03 p. m. He lived some distance away. It took 20 minutes or longer to go on a street car from his place of work to his home. He arrived home at about 9:30 p. m. When he arrived home he had a scratch on one hand. It was about half an inch long and not very deep but the skin was "torn quite badly" and it had been "bleeding quite badly." He had wrapped it in a piece of bandkerchief. This was bloody. The blood was hard. Witnesses say it looked as though the scratch was about two hours old. Deceased had no scratch when he left home in the morning.

¹Reported in 165 N. W. 478.

Men engaged in his line of work often receive scratches upon their hands, sometimes from nails inside of the cars. Deceased worked April fourth and fifth. On the evening of the fifth his finger was much swollen. Blood poisoning had set in. A doctor was called. Deceased was later removed to a hospital. He died a week later. There is in evidence a copy of a letter, dated April 28, 1916, written by the Dickinson Company to a representative of the Casualty Company in which the company carried insurance, which contains the following: "In regard to the case of Robert I. Rackman, will advise that our Supt., Mr. Brown, interviewed all of the workmen here in the plant, and found only one man that knew anything about R. I. Rackman being injured. We will forward you his signed statement as soon as he returns to work."

The trial court found that the death of deceased resulted from this scratch and that the injury arose out of and in the course of his employment. The principal question in the case is, whether the evidence sustains this finding.

The evidence is quite satisfactory that the blood poisoning and the ensuing death were the result of the scratch. The medical testimony is to that effect and the sequence of events leaves very little doubt on that point.

That the scratch was received while he was engaged in his employment is not so clear. There was no direct evidence that the scratch was so received. We think, however, the evidence is sufficient. The fact that deceased had no scratch when he left home in the morning and had one when he came home from work at night; that he must have come home immediately, for he was home within half an hour of the time he quit work; that the scratch had blood upon it which had hardened, indicating that the scratch had been received earlier than the time he quit work; that it was such a scratch as he was not likely to receive on a trip from his work to his home, and such a scratch as he might well have received while at work, these facts taken in connection with the letter above quoted, which is of some force as an admission, were such that the course of his usual work and that it woose out of it.

Fleet v. B. H. Johnson & Sons, 1913 W. C. & Ins. R. 149, was a similar case and a similar result was reached; Blaess v. Dolph (Mich.) 161 N. W. 885, was not dissimilar.

I

Some testimony was received "subject to objection." No final ruling on the objection was ever made or requested. The question of the admissibility of this evidence is accordingly not presented by this appeal. Herrick v. Morrill, 37 Minn. 250, 33 N. W. 849, 5 Am. St. 841; Bitzer v. Bobo, 39 Minn. 18, 38 N. W. 609; Stitt v. Rat Portage Lumber Co. 98 Minn. 52, 107 N. W. 824; Gourd v. County of Morrison, 118 Minn. 294, 136 N. W. 874; Grannis v. Hitchcock, 118 Minn. 462, 137 N. W. 186.

Order affirmed.

E. W. WILLIAMS v. ELIZA P. EVANS AND OTHERS. A. M. RAMER COMPANY v. SAME.¹

December 21, 1917.

Nos. 19.166, 19.167.

Constitution — state legislature — Fourteenth Amendment — liberty of contract.

1. The state legislature possesses all legislative power not withheld or forbidden by the state of Federal Constitution. The provisions of the state Constitution, so far as here applicable, are not more restrictive than the Fourteenth Amendment to the Federal Constitution. This amendment guarantees liberty of contract, subject to regulation under the police power of the state.

Master and servant - minimum wage act - police power.

2. Chapter 547, Laws 1913, establishing a Minimum Wage Commission and providing for the determination and establishment of minimum wages for women and minors, is a valid exercise of the police power of the state.

Constitution — delegation of legislative power.

3. The legislature cannot delegate legislative power, but it may delegate authority or discretion to be exercised under and in pursuance of the law. It may delegate power to determine some fact or state of things upon which the law makes its own operation depend.

¹Reported in 165 N. W. 495.

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4. This act was a complete statute when it left the legislature, and does not delegate legislative power to the Minimum Wage Commission.

Same - minimum wage act valid.

5. Inequalities of minor importance do not render a law invalid. The limitations of the Constitution are flexible enough to permit of practical application.

Two actions in the district court for Ramsey county. The Williams action was by a taxpayer on his own behalf and on behalf of other taxpayers similarly situated. The Ramer action was by the owner of a manufacturing plant at which a large number of women workers, adult and minor, were employed. Both actions were to restrain the members of the Minimum Wage Commission from expending any money in furtherance of the provisions of Laws 1913, p. 789, c. 547, and to restrain defendant Iverson, as state auditor, from auditing any claims incurred by the commission on account of anything done under the provisions of the act and to restrain him from issuing any warrant in payment of any such claim.

Plaintiffs obtained orders requiring defendants to show cause why a temporary injunction should not issue. From an order in each case, Catlin, J., granting plaintiffs' motion for a temporary injunction, defendants appealed. From an order in the Ramer case overruling their demurrer to the complaint, defendants appealed. Reversed.

Lyndon A. Smith, Attorney General, John C. Nethaway, Assistant Attorney General, and Alva R. Hunt, for appellants.

The experience of the world and our common knowledge are continually changing. Things unknown a century ago are now familiar to us all; children of today are fully acquainted with modern inventions, such as telephones, electric lights, and other modern improvements; this common knowledge is not the same as it was even 25 years ago. Therefore the power of government termed the police power, being based upon common knowledge of what is injurious to the health, morals or welfare of the public, must of necessity be elastic as is the common knowledge itself. When that experience and knowledge have taught us that certain

things are injurious in any of these respects, then the police power expands to meet the necessity caused by our increased knowledge.

Under our form of government the legislature determines whether conditions call for corrective legislation. Mugler v. Kansas, 123 U. S. 623, 660, 8 Sup. Ct. 273, 31 L. ed. 205. The legislature, in passing laws intended to advance and protect the common welfare of society, need not wait until the opinions are all one way, or until all doubts that certain conditions are harmful, are removed by investigation. It is sufficient if the question of the baleful effect is debatable. Muller v. Oregon, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. ed. 551; Matter of Viemeister, 179 N. Y. 235, 72 N. E. 97; State v. Layton, 160 Mo. 474. When a law is attacked as not being a valid exercise of the police power, evidence is not admissible to overcome common knowledge. Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. ed. 643.

If there were but one community in the state where the wage-earning women in the factories, stores and offices, were receiving less than living wages, and it was merely a debatable fact that such low wages underfed the women, tended to affect their strength and health, and tended to cause any number of them to accept the easy alternative of immorality to increase their income to meet their needs, the court would take judicial notice of those things and uphold any police regulation which in the judgment of the legislature tended to remedy the evil. In order to sustain the law, the court is not required to find beyond a reasonable doubt, that the conditions exist and that the enforcement of the law will tend to cure the evil; but to overthrow the law it must find beyond a reasonable doubt that the conditions do not exist, or that the means sought will not tend to remedy the evil.

Woman's weaker physical structure, her maternal functions and necessary dependency on man, place her at a disadvantage in the struggle for existence. Muller v. Oregon, 208 U. S. 412, 421, 28 Sup. Ct. 324, 52 L. ed. 551.

There is no literature tending to prove that wages, below a living wage, do not tend to injuriously affect the health and morals of wage-earning women. The literature is all the other way, and there are volumes of it. The reports of the numerous commissions, established by law in the various states, expressly to inquire into the condition of

wage-earning women, are entitled to great weight. Massachusetts Commission on Minimum Wage (1912); Louise B. Moore, Study of Standards and Cost of Living (1907); Elizabeth B. Butler, Women and the Trades (1909); Senate Document No. 645, 61st Congress, 2nd Session (1912).

Laws have been passed in a dozen or more states regulating the hours of labor of women and all have been upheld as a proper exercise of the police power for the protection and preservation of the public health. They are all based upon the principle that women are in a class by themselves, in the nature of wards of the state, or dependents, that any legislation necessary for the protection of their health and general welfare, is for the general welfare, and private rights must yield for the common good. Comm. v. Riley, 210 Mass. 287, 97 N. E. 367; W. C. Ritchie & Co. v. Wayman, 244 Ill. 509, 91 N. E. 695; People v. Elerding, 254 Ill. 579, 98 N. E. 982; Ex parte Miller, 162 Cal. 687, 124 Pac. 427; Withney v. Bloem, 163 Mich. 419, 128 N. W. 913; State v. Dominion Hotel, 17 Ariz. 267, 151 Pac. 958.

So laws which not only fix the hours of labor but also fix the minimum wage have been held valid. Malette v. City of Spokane, 77 Wash. 205, 137 Pac. 496; Atkin v. Kansas, 191 U. S. 207, 210, 24 Sup. Ct. 124, 48 L. ed. 148; State v. Midwest Const. Co. (Kan.) 162 Pac. 1175; Byars v. State, 2 Okla. Cr. 481, 102 Pac. 804; Clark v. State, 142 N. Y. 101, 36 N. E. 817.

Felix Frankfurter, attorney for the Consumer's League, as amicus curiae, filed a copy of his brief in Stettler v. O'Hara, 243 U. S. 629.

Brown, Abbott & Somsen and Young, O'Brien & Stone, for respondents.

It is settled by Federal decisions that: (1) Hours of labor may be fixed in public works—that is, in works for the state or its municipal subdivisions—free from interference by Federal authority; (2) hours of labor of men cannot be fixed in private employment, unless the employment is visibly injurious to public health; (3) hours of labor for women may be fixed by law in public or private employment. Atkin v. Kansas, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. ed. 148; Holden v.

Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. ed. 780; Mueller v. Oregon, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. ed. 551.

There is no analogy between laws relating exclusively to hours of labor and laws fixing a minimum wage, except so far as both interfere with the liberty of contract, which is one of the rights included in the "liberty" protected by the Fourteenth Amendment.

The act is unconstitutional because it is subversive of the political and economic principles upon which our governmental system rests. Lochner v. New York, 198 U. S. 48, 25 Sup. Ct. 539, 49 L. ed. 937 (bakery case); Peterson v. Widule, 157 Wis. 641, 147 N. W. 966, 52 L.R.A. (N.S.) 790, and because it is in violation of Const. (Minn.) art. 1, § 7, and Amendment 14 of the Federal Constitution, and deprives respondent and others in his class, of the liberty to contract, taking their property without due process of law. The act is unconstitutional because it delegates legislative authority to the Minimum Wage Commission, created by the act. State v. Chicago, M. & St. P. Ry. Co. 38 Minn. 281, 37 N. W. 782; Brenke v. Borough of Belle Plaine, 105 Minn. 84, 117 N. W. (a) The legislative question of whether there shall be a legal wage at all, and if so when and under what circumstances it shall be put into effect, is placed by the act in the power and discretion of the commission. (b) Under sections 7-9 of the act the commission by the aid of its advisory boards in its uncontrolled discretion and judgment produces the legal wage, and assumes to exercise under those sections the highest legislative authority. (c) The legislative question of when or under what circumstances a wage once fixed shall be repealed or amended is placed in the unlimited discretion of the commission by section 10. (d) By section 11 the commission is vested with power to amend the wage law at its pleasure, excepting persons from its operation.

The act is also unconstitutional because the commission is vested with the law-making power to classify persons and subjects for the legislative purposes, and because the law, and the orders made under it, involved in this suit are so indefinite and uncertain in their terms as to be incomprehensible.

HALLAM, J.

The legislature of Minnesota in 1913 passed an act (Laws 1913, p. 789, c. 547 (G. S. 1913, § 3904), establishing a Minimum Wage Commission and providing for the determination and establishment of minimum wages for women and minors.

This act defines a living wage as a wage "sufficient to maintain the worker in health and supply him with the necessary comforts and conditions of reasonable life." "Minimum wage" is given the same meaning. Section 20 (G. S. 1913, § 3923).

The act prohibits every employer in any occupation "from employing any worker at less than the living wage or minimum wage as defined in this act and determined in an order of the commission." Section 12 (G. S. 1913, § 3915).

The act gives the commission the power "at its discretion" or at the request of not less than 100 persons engaged in any occupation where women and minors are employed, to make an investigation. The commission must hold public hearings at which employers and employees may appear. If, after investigation, the commission is of opinion that the wages paid to one-sixth or more of the women or minors employed therein are less than living wages, the commission shall establish a legal minimum rate of wages in said occupation for women and minors of ordinary ability and for learners and apprentices. The commission shall then issue an order to be effective 30 days thereafter making the wages then determined the minimum wages in said occupation throughout the state or within any area of the state, if differences in the cost of living warrant this restriction.

Defendants, members of a commission constituted as provided by the act, after a hearing and investigation, made two orders fixing minimum wages for women and minors of ordinary ability in certain occupations. These actions are brought to restrain the enforcement of the orders on the ground that the statute is unconstitutional and void. The trial court overruled a demurrer to the complaint and ordered a temporary injunction as prayed. Defendants appealed. The ground of the order was that the statute is unconstitutional and void. This is the question in the case.

1. We do not look to the Constitution to find legislative power of a

state. The state legislature possesses all legislative power not withheld or forbidden by the terms of the state or Federal Constitution. State v. Corbett, 57 Minn. 345, 59 N. W. 317, 24 L.R.A. 498; State v. City of Mankato, 117 Minn. 458, 463, 136 N. W. 264, 41 L.R.A.(N.S.) 111.

There are some limitations in the state Constitution on legislative power. It may safely be said, however, that, so far as applicable to the facts in this case, there are none more restrictive than the limitations of the Fourteenth Amendment to the Federal Constitution. We may therefore direct our inquiry to the question whether this law is violative of any provisions of the Fourteenth Amendment.

The pertinent part of the Fourteenth Amendment reads: "Nor shall any state deprive any person of * * * liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." This guarantees to the citizen liberty of contract and liberty to conduct his business affairs in his own way. Atkin v. Kansas, 191 U. S. 207, 24 Sup. Ct. 277, 48 L. ed. 148; Lochner v. New York, 198 U. S. 45, 48, 25 Sup. Ct. 539, 49 L. ed. 937, 3 Ann. Cas. 1133; Adair v. U. S. 208 U. S. 161, 28 Sup. Ct. 277, 52 L. ed. 436, 13 Ann. Cas. 764; McLean v. Arkansas, 211 U. S. 539, 545, 29 Sup. Ct. 206, 53 L. ed. 315; Coppage v. Kansas, 236 U. S. 1, 35 Sup. Ct. 240, 59 L. ed. 441, L.R.A. 1915C, 960. This right it is claimed has been infringed by this statute.

The liberty of contract guaranteed by this amendment is not absolute. It is subject to the power of the state to legislate for certain permissible purposes. For example, the state may, under certain conditions regulate hours of labor of women (Muller v. Oregon, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. ed. 551, 13 Ann. Cas. 957; Riley v. Massachusetts, 232 U. S. 671, 34 Sup. Ct. 469, 58 L. ed. 788); or of minors in certain occupations (Sturges & Burn Mnfg. Co. v. Beauchamp, 231 U. S. 320, 34 Sup. Ct. 60, 58 L. ed. 245, L.R.A. 1915C, 1196); or of men engaged in employments hazardous to health (Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. ed. 780; Bunting v. Oregon, 243 U. S. 426, 37 Sup. Ct. 435, 61 L. ed. 830); or of men employed on public work (Atkin v. Kansas, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. ed. 148); or it may regulate conditions of labor, or the time of payment of employees (Patterson v. Bark Eudora, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. ed.

1002; Erie R. Co. v. Williams, 233 U. S. 685, 34 Sup. Ct. 761, 58 L. ed. 1155, 51 L.R.A.(N.S.) 1097); or the manner or medium of payment (Knoxville Iron Co. v. Harbison, 183 U. S. 13, 22 Sup. Ct. 1, 46 L. ed. 55; McLean v. Arkansas, 211 U. S. 539, 29 Sup. Ct. 206, 53 L. ed. 315).

The power of a state legislature to restrict liberty of contract is coincident with what is familiarly known as the police power. Freund, Police Power, §§ 498-500. "The police powers of the state," said Chief Justice Taney, in the License Cases (Thurlow v. Massachusetts, 5 How. 504, 583, 12 L. ed. 256), "are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions." In Barbier v. Connolly, 113 U. S. 27, 31, 5 Sup. Ct. 357, 359, 28 L. ed. 923, Justice Field defines the police power as the "power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity." In Noble State Bank v. Haskell, 219 U. S. 104, 111, 31 Sup. Ct. 186, 188, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, Ann. Cas. 1912A, 487, that court broadened the definition as follows: "It may be said in a general way that the police power extends to all the great public needs. * * * It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare," citing Camfield v. U. S. 167 U. S. 518, 17 Sup. Ct. 864, 42 L. ed. 260.

Yet there is a limit to the valid exercise of the police power by the state. It is not enough to merely assert that the subject relates to the health, peace, morals, education or good order or welfare of the people. "The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor." Lochner v. New York, 198 U. S. 45, 57, 25 Sup. Ct. 539, 543, 49 L. ed. 937, 3 Ann. Cas. 1133. "The liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint" not freedom from reasonable regulation. The real test is whether the limitation is a "reasonable regulation to safeguard the public interest,"

imposed, not solely for the benefit of the individual, but essentially for the common benefit of all. Miller v. Wilson, 236 U. S. 373, 380, 35 Sup. Ct. 342, 59 L. ed. 628, L. R. A. 1915F, 829.

2. Bearing these principles in mind, we must determine whether this statute is within the proper field of legislation.

There is a notion, quite general, that women in the trades are underpaid, that they are not paid so well as men are paid for the same service, and that in fact in many cases the pay they receive for working during all the working hours of the day is not enough to meet the cost of reasonable living. Public investigations by publicly appointed commissions have resulted in findings to the above effect. Starting with such facts, there is opinion, more or less widespread, that these conditions are dangerous to the morals of the workers and to the health of the workers and of future generations as well.

It is a strife for employer and employee to secure proper economic adjustment of their relations so that each shall receive a just share of the profits of their joint effort. In this economic strife, women as a class, are not on an equality with men. Investigating bodies, both of men and of women, taking all these facts into account, have urged legislation designed to assure to women an adequate working wage. The legislatures of 11 states have passed laws having the same purpose as the one here assailed.

It is not a question of what we may ourselves think of the policy or the justification of such legislation. The question is, is there any reasonable basis for legislative belief that the conditions mentioned exist, that legislation is necessary to remedy them, and that laws looking to that end promote the health, peace, morals, education or good order of the people and are "greatly and immediately necessary to the public welfare?" If there is reasonable basis for such legislative belief, then the determination of the propriety of such legislation is a legislative problem to be solved by the exercise of legislative judgment and discretion. Holden v. Hardy, 169 U. S. 366, 398, 18 Sup. Ct. 383, 42 L. ed. 780.

We think sufficient basis exists. It is not necessary that we should hold that statutes of this kind applicable to men would be valid. We think it clear there is such an inequality or difference between men and women in the matter of ability to secure a just wage and in the conse-

quences of an inadequate wage that the legislature may by law conpensate for the difference. That there is such difference, has been recognized as an economic fact by the United States Supreme Court, Muller v. Oregon, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. ed. 551, 13 Ann. Cas. 957; Miller v. Wilson, 236 U. S. 373, 35 Sup. Ct. 342, 59 L. ed 628, L.R.A. 1915F, 829. Two cases have arisen in other states involving the constitutionality of minimum wage laws for women. In both the laws were sustained. Stettler v. O'Hara, 69 Ore. 519, 139 Pac. 743, L.R.A. 1917C, 944, Ann. Cas. 1916A, 217; State v. Crowe, 130 Ark.—, 197 S. W. 4.

We sustain the principle of minimum wage legislation as applied to women. By like reasoning the principle may be sustained as applied to minors.

3. The other main contention of the respondent is that the law is unconstitutional because it delegates legislative power to a commission. The act delegates to the commission extensive powers. It is well settled that the legislature may not delegate to a commission the power to make laws. State v. Chicago, M. & St. P. Ry. Co. 38 Minn. 281, 37 N. W. 782; State v. Great Northern Ry. Co. 100 Minn. 445, 111 N. W. 289, 10 L.R.A.(N.S.) 250; Brenke v. Borough of Belle Plaine, 105 Minn. 84, 117 N. W. 157. A statute, to be valid, must be complete as a law when it leaves the legislature. If, by the terms of the act, it is to be effective only in case a commission deems the act expedient, then there is a delegation of legislative power and the act is void, for a determination of legislative expediency can be made by the legislature alone. State v. Young, 29 Minn. 474, 9 N. W. 737. The legislature may, however, delegate to a commission the power to do some things which it might properly, but cannot advantageously, do itself. State v. Chicago, M. & St. P. Ry. Co. 38 Minn. 281, 299, 37 N. W. 782; Wayman v. Southard, 10 Wheat. 1, 42, 6 L. ed. 253. It may vest in a commission authority or discretion to be exercised in the execution of the law. State v. Chicago, M. & St. P. Ry. Co. supra; State v. Wagener, 77 Minn. 483, 80 N. W. 633, 778, 1134, 46 L.R.A. 442, 77 Am. St. 681; State v. Great Northern Ry. Co. 100 Minn. 445, 111 N. W. 289, 10 L.R.A.(N. S.) 250; Borgnis v. Falk Co. 147 Wis. 327, 358, 133 N. W. 209, 37 L.R.A.(N.S.) 489. It may delegate power to determine some fact or

state of things upon which the law makes its own action or operation depend (Locke's Appeal, 72 Pa. St. 491, 13 Am. Rep. 716; Union Bridge Co. v. U. S. 204 U. S. 364, 383, 27 Sup. Ct. 367, 51 L. ed. 523). and may declare its law shall be operative or applicable only upon the subsequent establishment of some fact. Minneapolis, St. P. & S. S. M. Ry. Co. v. Railroad Commission, 136 Wis. 146, 116 N. W. 905, 17 L.R. A.(N.S.) 821; Cargo of Brig Aurora v. U. S. 7 Cranch, 382, 3 L. ed. 378. In all such cases, when it does take effect, it is by force of legislative action as fully as if the legislature had fixed, without condition, the time or occasion of its becoming effective. State v. Sullivan, 67 Minn. 379, 69 N. W. 1094. "The true distinction * * * is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." Cincinnati, W. & Z. R. Co. v. Commrs. of Clinton County, 1 Oh. St. 77, 88, quoted in Field v. Clark, 143 U. S. 649, 693, 694, 12 Sup. Ct. 495, 36 L. ed. 294.

4. Respondent contends that this act was not a complete law when it left the legislature and that there was no complete law until after the commission made an order and that the power to determine "when and where there shall be any law, and what it shall be, is to be exercised at the whim and caprice of the commission."

Let us address ourselves to this question. As above stated, section 20 defines a living wage. Section 12, in effect, enjoins every employer to pay a living wage "as defined in this act and determined in an order of the commission."

We think this must be construed as establishing a living wage as defined in the act as the lawful minimum wage, and as fixing a living wage as so defined as the standard by which the commission must be guided in determining a minimum wage for any occupation. The determination of a minimum wage by the commission is accordingly a determination of a fact "upon which the law makes * * * its own action depend."

We do not overlook the fact that the statute cannot be effectively executed nor its penalties enforced until the commission establishes a mini-

mum wage, nor the fact that the commission is given a discretion as to when to make the investigation into any particular occupation which may result in an order fixing a minimum wage in that occupation. These provisions vest "discretion as to its execution, to be exercised under and in pursuance of the law," and they do not prevent the act from being a complete law nor render it invalid. There are abundant instances of the application of this principle.

One court has gone so far as to say: "Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law." Moers v. City of Reading, 21 Pa. St. 188, 202, quoted in Field v. Clark, 143 U. S. 649, 694, 12 Sup. Ct. 495, 36 L. ed. 294.

The acts of Congress, establishing forest reservations, provide that their use for grazing purposes is subject to rules and regulations established by the secretary of agriculture, and make violation of such rules and regulations a penal offense. In U. S. v. Grimaud, 220 U. S. 506, 522, the defendant was convicted of violation of some rule or regulation of the department. The court sustained the law as against objection that this was an unconstitutional delegation of legislative power and said: "A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary fixes the penalty."

In Red "C" Oil Mnfg. Co. v. Board of A. of North Carolina, 222 U. S. 380, 390, 32 Sup. Ct. 152, 56 L. ed. 240, an act of the legislature of North Carolina provided that "all kerosene, or other illuminating oils, sold or offered for sale in this state, shall be subject to inspection and test to determine the safety and value for illuminating purposes." Power is conferred on the board of agriculture to make all necessary rules and regulations for the inspection of such oil and to adopt standards of safety, purity and luminosity, "which they may deem necessary to provide the people of the state with satisfactory illuminating oil." Penalties are provided for disobedience of the orders of the board. There could be no penalty until the board made an order. Objection was raised that this was a delegation of legislative power. The court

held the objection untenable and regarded the statute as in effect imposing a requirement that illuminating oils be safe, pure and afford a satisfactory light and as empowering the board of agriculture to determine that oils measure up to these standards.

In Buttfield v. Stranahan, 192 U. S. 470, 496, 24 Sup. Ct. 349, 48 L. ed. 525, the court had before it an act of Congress which made it unlawful to import tea inferior in purity, quality and fitness for consumption, provided for a board of experts, gave the secretary of the treasury power, upon recommendation of the board, to fix uniform standards of purity, quality and fitness for consumption, and provided that tea inferior to such standards should be within the prohibition of the act. Inferior tea was liable to destruction under certain conditions. Objection was made that this vested legislative power in the secretary of the treasury. This was overruled. The court held that "Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute." See also Monongahela Bridge Co. v. U. S. 216 U. S. 177, 30 Sup. Ct. 356, 54 L. ed. 435; Mutual Film Corp. v. Ohio Ind. Comm. 236 U. S. 230, 35 Sup. Ct. 387, 59 L. ed. 552, Ann. Cas. 1916C, 296.

In all such cases, the punishment is not fixed by the board, the making of rules is administrative, the substantial legislation is in the statute which provides the law and the penalty. Brodbine v. Revere, 182 Mass. 598, 66 N. E. 607; U. S. v. Grimaud, 220 U. S. 506, 520, 31 Sup. Ct. 480, 55 L. ed 563.

Decisions similar to the foregoing might be multiplied, but we think it unnecessary. The principles stated are now well recognized. The act contains no delegation of legislative power.

5. Other minor objections are raised. The commission is empowered to establish a minimum wage in any occupation, only when the wages paid to one-sixth or more of the women or minors employed therein are less than living wages. This is assailed as an unlawful basis of classification. The objection is not well taken. The act may exclude cases of minor or negligible importance. In Jeffrey Mnfg. Co. v. Blagg, 235 U. S. 571, 35 Sup. Ct. 167, 59 L. ed. 364, similar objections were made to the Workmen's Compensation Act of the state of Ohio, and they were

overruled. See also St. Louis Consol. Coal Co. v. Illinois, 185 U. S. 203, 22 Sup. Ct. 616, 46 L. ed. 872; McLean v. Arkansas, 211 U. S. 539, 29 Sup. Ct. 206, 53 L. ed. 315.

The limitations of the Constitution are flexible enough to permit of practical application. Recent decisions have more and more "recognized the difficulty of exact separation of the powers of government" (Mutual Film Corp. v. Ohio Ind. Comm. 236 U. S. 230, 246, 35 Sup. Ct. 387, 59 L. ed. 552), and the necessity of giving weight to practical considerations. Buttfield v. Stranahan, 192 U. S. 470, 496; Jeffrey Mnfg. Co. v. Blagg, 235 U. S. 571, 578, 35 Sup. Ct. 167, 59 L. ed. 364.

Objection is raised to sections 7 to 9 (G. S. 1913, §§ 3910-3912), which provide for "an advisory board," define its powers and the power of the commission to act upon its estimates, and section 10 (G. S. 1913, § 3913), which gives power to the commission in certain event to order new rates of minimum wages "if it sees fit." The validity of these provisions are not involved in this case, unless it can be said the whole act depends upon their validity. We do not think it does. We do not pass upon these provisions.

Order reversed.

On March 1, 1918, the following opinion was filed:

PER CURIAM.

The point is made in an application for a rehearing in this cause that the court failed to determine the question whether the order of the commission is void for uncertainty, in that the period is not therein prescribed during which employees may be treated as "learners" and "apprentices." We did not regard this as fatal to the order. These terms have a modern meaning reasonably well understood. City of St. Louis v. Bender, 248 Mo. 113, 117, 154 S. W. 88, 44 L. R. A. (N. S.) 1072. Practical experience under the order may suggest and render necessary something more specific in the respect stated. If so, a modification may be made to meet the conditions thus disclosed. But the absence of specific provisions in this particular is not fatal, and the order in the present form is valid. Until some action is taken by the commission, or by statute, the matter will be subject to regulation by contract between the employer and employee.

By the terms of the statute under which the order was made the operation thereof was postponed for the period of 30 days from its date. Prior to the expiration thereof the injunction herein was issued, thereby further postponing the operation of the order, and it will not go into effect until the injunction is dissolved on the remand of the cause to the court below. G. S. 1913, § 7888; State v. Chicago, M. & St. P. Ry. Co. 130 Minn. 144, 153 N. W. 320.

Petition for rehearing denied.

GEORGE H. THADEN v. FRANCIS BAGAN AND OTHERS.1

December 21, 1917.

No. 20,454.

Broker-action for compensation-verdict sustained by evidence.

1. The evidence sustains a finding of the jury that the plaintiff effected a sale of land of the defendants' intestate under an agreement with him whereby he was to have for his compensation all in excess of a stated selling price.

Witness to conversation in presence of decedent — statute — offer of proof.

2. The widow of the deceased was not precluded from testifying by G. S. 1913, § 8375 (1), which provides that a wife shall not be examined for or against her husband without his consent; nor was she prevented by G. S. 1913, § 8378, which provides that a party to an action or one interested in the event of it shall not testify to a conversation or admission of the deceased, from testifying to a conversation between the plaintiff and herself in the presence of the deceased who did not participate therein, but to make error in the exclusion of such testimony available it was necessary that the plaintiff make an offer of proof showing its materiality.

¹Reported in 165 N. W. 864.

Evidence — admission — omission from listed credits.

3. The omission of the plaintiff to list for taxation as a credit his claim for compensation as required by G. S. 1913, § 2316, et seq. was proper to be shown as an admission against the validity of it.

Same - tax lists - privilege.

4. The defendants might show such omission by the tax lists or they might take the statement of the defendant as to the fact when on the stand, and neither the provision of the tax law, G. S. 1913, § 2320, prohibiting a disclosure of the lists by the tax officers "except by order of court," nor the provision of G. S. 1913, § 8375 (5), prohibiting public officers from disclosing communications made to them in official confidence when the public interest would suffer from such disclosure, gives a privilege against disclosure.

Appeal and error - exclusion of evidence prejudicial.

5. Considering the nature of the case and the character of the evidence upon which the parties necessarily relied it is *held* that the exclusion of proof as to the listing was prejudicial.

George H. Thaden's claim for \$3,000 against the estate of Thomas F. Bagan, deceased, for commissions earned in the sale of a certain farm, was disallowed by the probate court for Freeborn county. Claimant appealed to the district court for that county where the appeal was tried before Kingsley, J., and a jury which returned a verdict in favor of plaintiff for \$3,904.50. From an order, Catherwood, J., denying their motion for a new trial, Francis Bagan and others, as administrators of the estate of Thomas F. Bagan, deceased, appealed. Reversed.

John F. D. Meighen, Bennet O. Knudson and Moonan & Moonan, for appellants.

Dunn & Carlson and John McCook, for respondent.

DIBELL, C.

This is an action to recover compensation for the sale of farm lands belonging at the time to Thomas F. Bagan, now deceased, and was tried in the district court on appeal from the probate court. The defendants are Bagan's administrators. There was a verdict for the plaintiff and the defendants appeal from the order denying their motion for a new trial.

- 1. On December 5, 1910, Bagan listed with the plaintiff for sale 600 acres of land in Fillmore county at the net price to him of \$60 per acre, the plaintiff to have for his compensation all in excess. The listing was exclusive for one month. If he did not sell within that time he earned nothing. He did not make a sale within the month. He claims that Bagan orally extended the time within which a sale might be made upon the terms of compensation contained in the listing agreement. A sale was made in March, 1911, to one A. W. Schild, at \$65 per acre, upon terms of payment satisfactory to Bagan. It is not in dispute that the plaintiff effected the sale and he claims that in doing so he earned under the contract \$5 per acre. Bagan died on November 18, 1914. statute precluded the plaintiff from testifying as to conversations with him relative to an extension. There was testimony of those who heard conversations between the two or admissions of Bagan having a tendency to establish plaintiff's contention. Some of it was quite direct. The defendants offered testimony tending to show that there was no extension of the terms of the listing agreement and that when the sale was made Bagan was to have the whole selling price, the plaintiff's activity in making the sale being explained by the fact that he had an arrangement with Schild whereby he took over his Kansas land, and disposed of it, so that in effect Schild got the Minnesota land in exchange subject to mortgage payments, and in such transaction received compensation or profit for his services. There was evidence for and against the plaintiff's contention and the evidence sustains the verdict.
- 2. The defendants called as a witness Mrs. Bagan, the wife of the deceased, and proposed to show conversations between her and the plaintiff. These conversations were in the presence of the deceased but he did not participate in them. The court was of the opinion that the proposed testimony offended G. S. 1913, § 8375 (1), which provides that a wife cannot be examined for or against her husband without his consent, and G. S. 1913, § 8378, which provides that it shall not be competent for a party to an action or one interested in the event of it to give evidence of a conversation or admission of a deceased person relative to a matter in issue, and sustained the plaintiff's objections. That such testimony would not violate section 8375 (1) is clear. 1 Wigmore, Ev. § 610,

and cases. It is also clear that it would not violate section 8378. It was not sought to show a conversation or admission of the decedent, which Mrs. Bagan overheard, but a conversation between Mrs. Bagan and the plaintiff which perhaps the decedent overheard but which if otherwise competent was competent though he did. Later in the trial, the court was of the opinion that it was in error in the view it took of section 8375, and so stated to counsel, but adhered to its view that the testimony offended section 8378. Counsel for defendants, when the question first arose, stated that he would like to make an offer of proof and there was some talk about putting it in writing but nothing was done at the time or later. The long settled rule is that there must be an offer showing the materiality of proffered testimony unless it otherwise appears or is presumptively material. 3 Dunnell, Minn. Dig. 1916 Supp. § 1917, and cases. It was appreciated by counsel but not observed. The rule is not narrowly construed. There may be cases where a ruling upon the single question of competency may be reviewed without an explicit offer of proof. The record is a little confused, but it does not present that precise question nor such a case. The making of an offer was deferred and was not again taken up. The court left it open for further determination. There should have been an offer showing the materiality of what the defendants were prepared to prove and without it there is no reviewable error.

- 3. Plaintiff's cause of action accrued in March, 1911. His claim was for \$3,000 and interest. It was a "credit" which was required to be listed by the plaintiff by the tax law. G. S. 1913, § 2316, et seq. The defendants proposed showing whether it was listed. It sought to do this by going to the lists in the possession of the county auditor and by taking the plaintiff's statement, when on the stand, as to the fact. That a showing that the plaintiff did not list his claim as a credit was proper as an admission of nonownership is not open to question. H. C. Jaquith Co. v. Shumway's Estate, 80 Vt. 556, 69 Atl. 157; Fudge v. Marquell, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895; Whitfield v. Whitfield, 40 Miss. 352.
- 4. That the plaintiff did not list his claim might be shown by the lists themselves, or by taking the statement of the plaintiff when a witness, un139 M.—4

less for some reason there is a prohibition or privilege preventing, is free of serious doubt; and that there is such prohibition or privilege is the contention of the plaintiff.

The tax law provides: "Such list shall be open to the inspection of the assessor, county auditor, their deputies and clerks, the board of review, the board of equalization, their clerks, the Minnesota tax commission and its assistants and clerks, but the details of the list made by taxpayers shall be disclosed to no other person except by order of court, and any assessor or other person who shall disclose such details shall be liable to a fine of not less than one hundred dollars nor more than five hundred dollars." G. S. 1913, § 2320. Another statute provides that "a public officer shall not be allowed to disclose communications made to him in official confidence when the public interest would suffer by the disclosure." G. S. 1913, § 8375 (5): Objections to the proof proposed were sustained and the ground of the ruling was that the question was collateral to any issue and that to require a disclosure would be a violation of the confidence required to be reposed by the taxpayer in the public and that it was contrary to public policy.

The legislature in enacting the money and credits tax law might, if it chose, have made the returns filed with its taxing officers absolutely privileged and have prevented their use against a taxpayer and relieved him from disclosing whether he listed his credits. The Federal revenue laws have provisions making returns and information acquired privileged, either absolutely or qualifiedly, and there are occasional state statutes of like purpose. They are given full effect. Boske v. Comingore, 177 U.S. 459, 20 Sup. Ct. 701, 44 L. ed. 846; In re Reid (D. C.) 155 Fed. 933; Stegall v. Thurman (D. C.) 175 Fed. 813; In re Valecia Condensed Milk Co. 240 Fed. 310, 153 C. C. A. 236; Williams v. Brown, 137 Mich. 569, 100 N. W. 786; Meyer v. Home Ins. Co. 127 Wis. 293, 106 N. W. 1087. Our tax statute is not of that character. The prohibition is against a disclosure "except by order of court." This exception intends that when an issue is on trial, upon which a disclosure is material, the court may require it, and its ruling shall be obeyed. It does not limit the duty of disclosure to a case where public revenue is directly involved. does not restrict courts in their judicial investigations nor make their

rulings discretionary. Saving obedience to the ruling of a court, the prohibition is absolute. There is nothing in section 8375 (5) prohibiting public officers from disclosing communications made to them in official confidence when the public interest would suffer from the disclosure which affects the result. This provision particularly refers to matters affecting the affairs of the state, as state secrets, and communications by informers.

There is a critical discussion and a collection of cases in 4 Wigmore, Ev. §§ 2367-2376. See also 4 Jones, Ev. § 762; 1 Elliott, Ev. § 639; 23 Am. & Eng. Enc. (2d ed.) 51.

Neither of the statutes mentioned prevents proof whether the plaintiff listed his claim.

5. Whether the erroneous exclusion of evidence as to the listing should result in a new trial is the question remaining.

That for four years commencing with 1911 the plaintiff omitted to list was of some weight as an admission against the validity of his claim. Bagan was a man of property and the claim was of value, if valid. The plaintiff claims that its validity was never denied by Bagan. The weight of the evidence as an admission was for the jury. Taking counsel of its experience it might conclude that men are prone to evade their share of the public burden of taxation and that a failure to list should not weigh heavily against him as an admission; or it might conclude that men generally do list their credits and that plaintiff's failure to do so evidenced little faith in it. The wilful omission to list credits or a false listing is a species of active dishonesty. We cannot assume it to be so prevalent that an unexplained omission to list is without significance. Instead we ought to assume that men generally respond to the call of good citizenship and honestly report their credits. If the evidence were direct and positive upon the issue determinative of the case, or controlling in favor of the plaintiff, we might not reverse for the erroneous exclusion of such evidence, for new trials are granted only for substantial and prejudicial error. The evidence was not at all so. The verdict might well enough have gone either way. The jury, through no fault either of the plaintiff or the defendants, was required to determine the issue upon evidence

largely indirect and of uncertain probative value, and it should have had all the aid permitted by the law of evidence. We hold the exclusion prejudicial.

Order reversed.

ALMA S. NELSON v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.¹

December 21, 1917.

No. 20.541.

Master and servant — contributory negligence — question for jury.

1. In an action by a brakeman's mother against his employer, to recover for the care and for the loss of earnings of the son, occasioned by personal injuries to him, held, the question of contributory negligence was for the jury, and the issue of negligence on the part of defendant was not litigated on the trial, but was practically conceded.

Trial - waiver of objection to charge.

2. Where during the trial there was no controversy over the question of defendant's negligence, and in its charge the court instructed the jury, in effect, that there was no dispute but that defendant was negligent, and that defendant admitted that it was negligent, if defendant had any objection to the instruction as given, it should have called the court's attention to the particular part of the charge complained of. Not having done so the error was waived.

Action in the district court for Mower county by Alma S. Nelson to recover \$2,500 for loss of earning power and services of her son Joel during his minority, and \$300 for expenses and time spent in caring for her son, because of injuries received by him while in defendant's employ. The answer alleged a settlement by defendant for \$7,000 in a prior action brought by his guardian ad litem. The case was tried before Kingsley, J., who at the close of the testimony denied defendant's motion for a directed

¹Reported in 165 N. W. 866.

verdict, and a jury which returned a verdict for \$704.50. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

F. W. Root, Nelson J. Wilcox and J. N. Nicholsen, for appellant. Sasse & French, for respondent.

QUINN, J.

Plaintiff brought this action to recover for the loss of earnings, and compensation for the care of her minor son, resulting from injuries which he sustained through the alleged negligence of the defendant while in its employ as a brakeman on a freight train at Fairmont, Minnesota. Plaintiff had a verdict. From an order denying its motion for judgment or a new trial, defendant appealed.

At Fairmont, the railroad track extends east and west. The platform is practically on a level with the top of the rails and comes to within about 2 feet of the south rail of the main track. A passing track from the east along the north side of the main track connects with the main track by a switch immediately opposite the depot.

On December 13, 1910, the plaintiff's son, Joel Nelson, then 17 years of age, was head brakeman on one of defendant's freight trains running east from Jackson, through Fairmont to Austin. This train was late, arriving shortly before the passenger train from the east, due at about 10 o'clock in the forenoon. The freight train was made up of about 25 cars, and, as it came into the station, ran past so that the caboose stopped several car lengths east of the depot. When the passenger train arrived from the east, it headed in on the passing track and came back onto the main track over the switch at the depot, stopping so that the baggage car stood with its front wheels on the main track and the rear wheels on the passing track, when the baggage was unloaded and piled onto trucks standing within a few inches of the north edge of the depot platform. Of this Joel had no notice, unless he saw the trucks while about to couple the engine to the caboose, as hereinafter referred to, which he might have had he looked that way. As the passenger went west the freight engine backed down over the passing track and onto the main track opposite the depot; then it pulled ahead and Joel coupled the engine onto the ca-He then walked a short distance to the east, and as the engine boose.

backed down with a number of freight cars Joel caught onto one of the grab irons on the side of the car, and with his feet in the stirrup and his face turned to the east rode on the car until he came in contact with the baggage truck and was brushed off and his arm run over, necessitating its amputation near the shoulder.

Defendant urges: (1) That Joel's injury was the result of contributory negligence on his part; (2) that there is no proof of negligence on the part of the defendant; (3) that the court erred in its instructions in taking the question of negligence on the part of the defendant from the jury.

The question of Joel's negligence is based upon the position he occupied in approaching the place where the truck was standing and in failing to turn and look to the west. His position was a usual one assumed by brakemen engaged in switching service, and unless he saw the truck or knew that it was so near the track as to be a source of danger, there would be nothing in the position he occupied which could be charged as negligence. He testified that he was required to watch to the east where the conductor was for signals. On the whole we think the question was for the jury.

As the passenger pulled out for the west, the truck with the baggage was left in such proximity to the track that a passing car would pass within a few inches of the same. Switching was being done in the yard. Defendant does not seem to have pressed the issue of its negligence on the trial, and whether the presence of the truck in close proximity to the railroad track was an act of negligence chargeable to defendant we do not determine, for we are clear that the issue, though raised by the answer, was waived by defendant. In its charge to the jury the court said:

"It isn't disputed by the defendant but what the defendant was negligent; that is to say, it was negligent for the defendant company to leave that truck in that particular spot in which it was left at the time in question; it was a dangerous place to leave it; it was dangerous because employees and men passing or repassing on cars or on the side of cars in switching operations were liable to be injured, if they came in contact with it; that made it a dangerous place and dangerous thing to leave there. Leaving that there in a dangerous position would be a negligent act on the part of the railroad company, whatever employee left it

there. The railroad company admit that in substance; they say that while they left that truck there in a dangerous situation and while they were guilty of negligence in doing it, nevertheless the plaintiff ought not to recover because he himself did not exercise ordinary care in taking care of himself."

This charge completely eliminated the issue of negligence on the part of defendant, and we think that, under the circumstances, if defendant did not concede its negligence, counsel should have so informed the court by proper exception at the trial. Not having done so, it should not now, for the first time, raise that question.

Affirmed.

STATE EX REL. LYNDON A. SMITH v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

December 21, 1917.

No. 20,542.

Carrier - effect of through traffic agreement.

1. The legal effect of a through traffic agreement between two or more railroad companies owning and operating connecting lines of road is the creation of a new and independent continuous line.

Same - continuous through line.

2. The contract set out in the opinion brings this case within the rule and with respect to the traffic there agreed upon creates a continuous through line under the control of appellant, between the points therein stated.

Same — distance tariff act — order of railroad commission.

3. Chapter 90, Laws 1913, the distance tariff act of that year, and a tariff order made thereunder by the Railroad and Warehouse Commission, apply to traffic carried on under such contract.

Same — interstate commerce — Constitution.

4. The judgment of the court below so declaring and requiring a compliance with the order as respects shipping points within the state, is not an interference with interstate commerce and violates none of the constitutional rights of appellant.

¹Reported in 165 N. W. 869.

Upon the relation of Lyndon A. Smith, attorney general, the district court for Ramsey county granted its alternative writ of mandamus commanding Chicago, Milwaukee & St. Paul Railway Company to put into effect the distance tariff promulgated by the Railroad and Warehouse Commission on December 10, 1913, pursuant to Laws 1913, p. 76, c. 90. The matter was tried before Dickson, J., who granted a peremptory writ. From the judgment entered pursuant to the order for judgment, respondent appealed. Affirmed.

F. W. Root, N. J. Wilcox, O. W. Dynes and Burton Hanson, for appellant.

Lyndon A. Smith, Attorney General, and James E. Markham, Assistant Attorney General, for respondent.

Brown, C. J.

The state Railroad and Warehouse Commission on December 10, 1913, acting under and pursuant to the provisions of chapter 90, p. 76, of the Laws of 1913, duly made and promulgated a general distance tariff order applicable to all railroad corporations and common carriers operating within the state, and thereby prescribed certain maximum rates for all freight and commodity shipments stated therein. The order on its face was made applicable to appellant, Chicago, Milwaukee & St. Paul Railway Company. But the company insisted that it did not apply to that part of its transportation business which extends partly over the line of the Northern Pacific Railway Company to Duluth, and other points on Lake Superior, included within the designation of "Head of the Lakes," namely, Carlton, Cloquet and Duluth, Minnesota, and Superior, Wisconsin, all reached by the Northern Pacific line, and for that reason refused to put the order in force or apply it to that traffic. The attorney general, on behalf of the state, then brought this proceeding in mandamus to compel obedience to the order as applied to shipments within the state. The appellant answered, therein setting up in defense its claim of the inapplicability of the order to the traffic over the two lines of road, and interposed also the contract between the railroad companies under which it was carried on and conducted, from which it contended that the tariff rates were controlled by chapter 344, p. 486, of the Laws of 1913, the Joint Traffic Act, and not by chapter 90, p. 76, Laws 1913, under which the disputed order was made.

At the conclusion of the trial below the court found the facts in harmony with the allegations of the petition and alternative writ, and further, that since October 1, 1900, appellant "has been and now is a common carrier of freight in intrastate commerce between points on its lines" in Minnesota, other than St. Paul and Minneapolis, and points at the Head of the Lakes reached by the Northern Pacific Company. Judgment was ordered and entered as demanded by relator and appellant appealed.

The facts are not in any material respect disputed and so far as necessary to an understanding of the questions involved are substantially as follows:

The appellant, Chicago, Milwaukee & St. Paul Railway Company, is a Wisconsin corporation and owns and operates a line of railroad extending from Chicago, in the state of Illinois, into and through this state, and between numerous shipping points therein, including St. Paul and Minneapolis. It has no constructed line to Duluth, this state, or to other points within the zone known as the Head of the Lakes. The company since the year 1900 has been conducting and carrying on a through transportation business, as a common carrier, from points on its line within and without the state, in part over its own line and in part over the line of the Northern Pacific Company, as it extends from St. Paul and Minneapolis to the Head of the Lakes; and as to shipments arising at that point or points beyond, from thence over the Northern Pacific line to any or all points on its own line, in Minnesota or elsewhere, excepting shipments terminating at St. Paul or Minneapolis. And this is the transportation business the court below held to be within the distance tariff order here involved. It has been so carried on by appellant under and pursuant to the terms and provisions of the contract referred to in its answer herein, the material portions of which are as follows:

"Section 1. The St. Paul Company hereby agrees that it will, so far as it lawfully may, give to the Pacific Company all such freight traffic as it may send or cause to be sent from or to points (other than

St. Paul and Minneapolis) on its lines or its connections to, from or through the 'Head of the Lakes,' and, as the case may be, will deliver to or receive from the Pacific Company all such traffic at St. Paul; it being the intention of the parties hereto, that the St. Paul Company shall do no business—except as it may by law be required to do—to, from or through the 'Head of the Lakes' by any other line than that herein established.

"Section 2. The Pacific Company hereby agrees to transport all the above mentioned traffic over and upon the lines mentioned and referred to in paragraph (a) above, and as the case may be, to receive from or deliver to the St. Paul Company all such traffic at St. Paul; and the St. Paul Company may, at all times during the continuance hereof, fix the through rates on any and all of the aforesaid traffic, and publish its own tariffs therefor; provided, however, that such through rates shall in no case be less than the local rates then charged by the Pacific Company on traffic of a like class between said 'Head of the Lakes' and the cities of St. Paul and Minneapolis; and provided further, that the above mentioned traffic shall not include any business received from or delivered to other carriers in or at St. Paul and Minneapolis; but provided also, that freight billed or destined to points in St. Paul or Minneapolis, the destination of which is changed before the property is removed from cars, shall not be considered as originating at said cities.

"Section 3. It is mutually understood and agreed by and between the Pacific Company and the St. Paul Company, that the through rates aforesaid shall be divided between said companies upon the basis of a pro rate per local rate, after deducting such proportions of such through rates as are due to other lines; and that for the purpose aforesaid, each of said companies shall at once file with the auditor of the other its local tariffs in effect October 1, 1900, and shall likewise, from time to time hereafter, when new tariffs are issued, in any wise affecting this agreement, immediately file, as aforesaid, copies of such tariffs; and said auditors shall prepare a table of divisions which will insure to the Pacific Company and to the St. Paul Company a pro rata per local rate of the revenue derived by them jointly from the business done under this agreement; provided, however, that nothing herein contained shall be construed as authorizing the destruction, before division, of any switching

charges, such charges being declared not to be proportions due to other lines, but an expense to be borne by the St. Paul Company; but provided also, that the Pacific Company shall make no switching or trackage charge against joint traffic for its own services.

"Section 4. It is further mutually understood and agreed by and between said last named companies that, for the purposes of this contract, three (3c) cents per hundred pounds shall be deemed and taken to be the local rate of the Pacific Company between St. Paul and Minneapolis, and the 'Head of the Lakes' on all grain, grain products, flax seed and lumber in car loads, and on coal in car lots, if loaded in box cars, or in open cars under the conditions specified in section 6; and that for the purpose of establishing a basis for division of through rates on coal, the tariffs first established by the St. Paul Company from the 'Head of the Lakes' shall be construed as based upon a local rate of three (3c) cents per hundred pounds to the Pacific Company; the percentage thereby established being used for the division of all future rates and—except as hereinafter otherwise provided—the Pacific Company's proportion of the through rates made by the St. Paul Company upon any of the above enumerated articles shall not at any time be more than three (3c) cents nor less than two (2c) cents per hundred pounds.

"Section 5. It is further mutually understood and agreed by and between the last named companies that on all traffic via the 'Head of the Lakes' in connection with boat lines on Lakes Superior, Huron and Erie, and their rail and canal connections, to or from points (other than St. Paul and Minneapolis) on the lines of the St. Paul Company and its connections, the Pacific Company will not ask, and shall not receive as its proportion of the through rate any greater rate than it at the same time accepts on traffic of the same class between St. Paul and Minneapolis and Lake Superior, Huron and Erie ports, or on traffic via said ports to or from St. Paul or Minneapolis.

"Section 6. The Pacific Company and the St. Paul Company further mutually agree that each of them will furnish (in the usual and customary manner among railroads) its quota of the freight cars necessary to carry on the business contemplated herein; and that if at any time the St. Paul Company shall not have at the 'Head of the Lakes'

sufficient cars to handle the business then tendered to it, and the Pacific Company shall at the same time be unable or unwilling to furnish cars therefor, then the Pacific Company will haul to the 'Head of the Lakes' such empty freight cars as the St. Paul Company may tender to it at St. Paul for the purpose aforesaid.

"Section 7. It is further mutually understood by said last named companies, and the Pacific Company agrees that it will handle all of the freight traffic of the St. Paul Company contemplated in this contract in the same manner in which it handles its own traffic of the like class; and that it will not give to any other railway or transportation company, or to any person or persons, for any traffic carried upon or over the premises embraced in this contract, lower rates or better facilities for substantially similar service than are given to the St. Paul Company; and in case any company or companies, person or persons, shall directly or indirectly receive from the Pacific Company such lower rates or better facilities, then and in such case, and for the time during which such lower rates or better facilities shall prevail, such lower rates shall apply to like business of the St. Paul Company in lieu of the rates provided for, or theretofore charged by the Pacific Company.

"Section 8. The Pacific Company and the St. Paul Company further mutually agree that all traffic covered by this agreement shall be through waybilled, except in cases where the auditors of the said companies shall decide that rewaybilling will be more convenient in keeping joint accounts, and all settlements of joint accounts shall be made in the usual and customary manner on or before the twenty-fifth day of each month for the business of the month next preceding.

"Section 9. It is further mutually understood and agreed by and between the last named companies, that the St. Paul Company may at its own expense establish at the 'Head of the Lakes' such commercial agencies as it deems necessary for the transaction of the business contemplated in this agreement; and that the officers and agents of the Pacific Company will comply with the instructions received from such agencies, or from the general officers of the St. Paul Company, in regard to said business, and will give to such agencies or to said general officers access at all proper times to its station records, so far as the same

may be necessary to enable the St. Paul Company to have full information regarding the business aforesaid.

"Section 10. Whereas, if the Pacific Company should at any time by law be divested of the right to the possession and use of the whole or any portion of the lines of railroad formerly controlled and operated by the Duluth Company, and mentioned and described in paragraph (a) above, and such possession and use should by law be cast upon the Duluth Company, the performance of this contract to that time will have resulted in great benefit and advantage to the Duluth Company, and the continuance thereof will result in like benefit and advantage to that company, Now, Therefore, it is agreed between the St. Paul Company and the Duluth Company, that if at any time while the provisions of this article I are in force the Pacific Company shall be divested as aforesaid of the possession and use of the whole or any portion of the property formerly belonging to the Duluth Company, and the Duluth Company shall again come into possession and use thereof, then and in such case the Duluth Company shall and will and it does hereby assume and agree to perform all the covenants and agreements hereinabove made by the Pacific Company to and with the St. Paul Company, so that the business contemplated in this article I shall; during the then remaining term hereof, be carried on in all respects as if no such divestiture had taken place, and the St. Paul Company's proportion of the above mentioned 'through rates' shall in no wise be changed thereby.

Section 11. * * *

"Section 12. It is mutually agreed that, for the purpose of the interchange of business provided in this article, as well as for use under article II hereof, if and when that article becomes effective, the Pacific Company and the St. Paul Company shall, as soon as may be, construct a connection between the tracks of the St. Paul Company and the tracks formerly belonging to the Duluth Company, in the city of St. Paul, in such manner and at such place as may be agreed upon between the general superintendents of said companies; such connection shall be put in at the joint expense of the two companies, and shall be operated and maintained during the continuance of any article of this agreement at joint expense."

The contract contains other provisions by which certain options are granted to appellant in reference to this line of traffic over the Northern Pacific road which may or may not in the future be acted upon, but they are of no special importance in this controversy and require no further mention. The trial court held that the portion of the contract here set out in legal effect created a single line of transportation, controlled by appellant, to which chapter 90, p. 76, Laws 1913, and the distance tariff order made thereunder, apply, and judgment was ordered accordingly.

It is the contention of appellant, upon the facts stated: (1) That since it neither owns nor operates a line of railroad reaching the Head of the Lakes, chapter 90, p. 76, of the Laws of 1913 has no application to traffic of the kind disclosed, and that the court below erred in construing the distance tariff order in question as applicable thereto; (2) that if the statute and order be held applicable, then the enforcement of the judgment appealed from will deprive appellant of its property without due process of law in violation of rights granted by section 1 of article 14 of the Federal Constitution, and result in the impairment of rights secured and obligations imposed by the contract under which the traffic is conducted, in violation of section 10 of article 1 of that Constitution; and (3) that the judgment requiring a compliance with the order of the commission constitutes an unlawful interference with interstate commerce.

Our conclusion after a full consideration of the questions presented is that none of these contentions can be sustained. We have no difficulty in holding, on the facts stated, that appellant was engaged in the business of a common carrier between the points stated, even though it did not in fact own or operate the line of the Northern Pacific Company between St. Paul and the Head of the Lakes. Under the traffic agreement with that company, as shown by the quotations from the contract, appellant is given full control over all shipments from its line over that of the Northern Pacific; the officers and agents of the latter in respect to that traffic are subject to its orders and directions, and appellant controls the matter of freight charges, within the limits of the law, fixing and publishing through rates over the route thus created. In the face of such facts it would seem clearly to follow that

appellant is as much engaged as a common carrier over the two lines of road, as though it owned and actually operated the Northern Pacific line. It has long been a rule of the Federal courts, and the Interstate Commerce Commission, that where two or more companies owning connecting lines of road, as in the case at bar, unite in a joint through traffic agreement, they form for the connected roads practically a new and independent continuous line. Chicago & N. W. Ry. Co. v. Osborne, 52 Fed. 912, 3 C. C. A. 347. The Through Rates Case, 12 I. C. C. 163: Rates on Grain Milled in Transit, 35 I. C. C. 27-32; R. R. Com. v. Southern Pac. Co. 19 I. C. C. 238. And the rule has been applied by state courts in intrastate transportation controversies. Kettenhofen v. Globe T. Co. 70 Wash. 645, 127 Pac. 295, 42 L.R.A. (N.S.) 902, Ann. Cas. 1914B, 776; J. H. Cownie Glove Co. & S. v. Merchants' Dispatch Transp. Co. 130 Iowa, 327, 106 N. W. 749, 4 L.R.A. (N.S.) 1060, 114 Am. St. 419. In fact the identical contract here before the court was held by the Interstate Commerce Commission in Superior Commercial Club v. Great Northern Ry. Co. 24 I. C. C. 96, as tantamount to the ownership by appellant of a line to the Head of the Lakes. That view is supported by the case of State v. Chicago & N. W. Ry. Co. 133 Minn. 413, 158 N. W. 627.

Chapter 90 of the Laws of 1913 was intended to prescribe a general tariff as to all shipments over one continuous line, whether owned by two or more companies, or the line be created in the manner here shown by joint traffic agreement. Chapter 344, the joint rate act, which appellant contends controls the case, was intended to cover that class of transportation where the affected lines have no through traffic arrangements and it has no application to the situation here presented. The fact that the Railroad and Warehouse Commission has promulgated a joint rate order thereunder is not therefore material.

Appellant's contract rights are not impaired. The relations between the two railroad companies may continue unaffected and the judgment appealed from will in no way interfere therewith. Appellant will still control the traffic. And though its share of the earnings may be less the obligations of the Northern Pacific Company under the contract remain as before the order was made. Nor do we find that any of the constitutional rights of appellant are infringed; there is no claim of

unreasonableness of the rate. Interstate commerce is not interfered with.

Judgment affirmed.

LARS BACKE v. J. P. CURTIS AND ANOTHER.1

December 21, 1917.

No. 20.547.

Conspiracy to kite checks — question for jury.

1. Whether appellant knew that the checks, which he permitted the defendant Gesell to issue to him as payee and which he indorsed and delivered to Gesell, were used by the latter in a check kiting scheme to defraud the bank upon which they were drawn, was a question for the jury under the evidence.

Bank and banking — knowledge of bank — question for jury.

2. The issue was also rightly left to the jury whether when honoring these checks the officers of the bank knew, or in the exercise of ordinary prudence should have known, the manner in which Gesell was doing his banking business.

Trial — charge to jury.

3. No reversible error is found in the trial court's rulings or instructions.

Action in the district court for Pennington county to recover \$3,390, fraudulently obtained by worthless checks from Farmers State Bank of Holt, and repaid to the bank by plaintiff, its precident. The case was tried before Grindeland, J., who when plaintiff rested denied the motion of defendant Curtis to dismiss the action, and at the close of the testimony denied his motion for a directed verdict, and a jury which returned a verdict in favor of plaintiff for \$2,850 and interest. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, defendant Curtis appealed. Affirmed.

Charles A. Pitkin, Charles Loring and G. A. Youngquist, for appellant. H. O. Kjomme and E. M. Stanton, for respondent.

¹Reported in 165 N. W. 488.

HOLT, J.

Plaintiff, as assignee of the Farmers State Bank of Holt, Minnesota, recovered a verdict against H. E. Gesell and J. P. Curtis. The latter alone appeals from the order denying his motion in the alternative for judgment notwithstanding the verdict or a new trial.

The complaint charged the defendants with having conspired to defraud the bank by means of a check "kiting" scheme, and that they successfully carried it out to the bank's damage in the amount of five checks, each being the foundation for a cause of action. It is not deemed necessary to further set forth or summarize the allegations of the pleading, for it is quite lengthy and no point is made in respect to its sufficiency. The main contention is that the evidence does not sustain the verdict, and hence appellant was entitled to judgment notwith-standing.

The defendants were both business men, residing at Thief River Falls, Minnesota. Gesell was running a cigar factory there and also a furniture store under the name of Stageburg Furniture Company. He had a cigar factory at Warren, Minnesota. He kept a deposit account at the Swedish American State Bank at the last named place, one at the First National Bank of Thief River Falls, and in the spring of 1915 opened another in the name of Stageburg Furniture Company with the Farmers State Bank of Holt. He also seems to have had a checking account in another bank at Warren, but what deposits were made therein is left in uncertainty. The defendant Curtis had been in partnership with Gesell in one business venture, and they had dealings with each other during the time the checks here in question were placed in circulation. Curtis was conducting a drug store at Thief River Falls, and also dealt in lands, carried on insurance and other business enterprises. He was a director in the First National Bank mentioned.

Just when Gesell began to "kite" checks does not appear, nor does the record fully disclose the modus operandi at the First National or the Swedish American Banks, except that in each bank he made daily deposits of several hundred dollars during July and up to August 11, 1915, and that the most of the checks deposited with the last named bank were drawn upon the Farmers State Bank of Holt. It likewise appears from the account with the Farmers State Bank of Holt that

he deposited checks therein daily during July and up to August 14, 1915. So far as disclosed by the record, none of the checks so deposited to the account of Stageburg Furniture Company in the Holt bank bore Curtis' name either as payee or as indorser. From the meager proof as to the makers and payees of the checks deposited, it appears that some checks were drawn by Gesell payable to himself upon his personal accounts in the First National Bank or in the Swedish American Bank and were indorsed by him, others were drawn by Poston Bros. to Gesell's order upon the Citizens Bank of Thief River Falls. As stated, Gesell made daily deposits in these three banks. Among his deposits in the First National Bank to his individual account there was each time a check drawn by Stageburg Furniture Company, by F. O. Stageburg, upon the Farmers State Bank of Holt in favor of J. P. Curtis, the first one, disclosed by the record, being dated July 31, 1915, for \$640, and every banking day thereafter a similar check in every respect was deposited, except that the amount thereof was each day ten dollars less than that of the previous day. These checks were indorsed by the payee J. P. Curtis, sometimes in blank, but more often with the stamp "Pay any Bank or Banker or order, J. P. Curtis." The First National Bank indersed and sent these checks to the Merchants National Bank of Crookston, and then, we take it, the checks were cleared or paid by the Farmers State Bank of Holt through the Red Lake Falls Bank. It will thus be seen that there was no indication of an irregular indorsement or deposit to be gathered from an examination of these checks. The only inference would be that the checks had been deposited in the First National Bank to the checking account of J. P. Curtis, payee, or that he had employed that bank as his agent to collect the same. There is evidence tending to show that Gesell knew that the First National Bank would not place the checks drawn by the Stageburg Furniture Company to the immediate credit of his checking account. unless secured by the indorsement of a responsible party, and for that reason he procured Curtis as payee and indorser. Curtis so understood the situation. It is clear from the evidence that the manner in which Gesell was making use of checks to procure credit at these banks was not the usual, legitimate course of dealing with banking institutions and was calculated to defraud them. It seems equally clear

that the jury could justly find that Curtis was fully cognizant of what Gesell was doing and with open eyes was assisting in obtaining credit for him by means likely ultimately to bring loss to the banks. Indorsing such a large check every day for the use of one whom he would not personally trust for a few hundred dollars without ample security, and knowing that such check would at once be used to obtain an immediate checking credit at a bank, tends to prove an intentional furthering of Gesell's "check kiting" scheme.

The only debatable proposition in this case is whether the evidence conclusively shows that the officers in charge of the Farmers State Bank of Holt knew, or in the exercise of ordinary prudence ought to have known, when the checks involved in this action were paid, that Gesell was engaged in "check kiting." This bank did not, as to these checks, have the same opportunity that the First National Bank had of knowing that Curtis was an accommodation indorser for Gesell, for the latter bank knew that after indorsement they were in the hands of Gesell and were by him deposited to the credit of his checking account. cashier of the Swedish American Bank of Warren, evidently a victim of the same vicious practice, testified that he had become suspicious of Gesell's banking system some time previous to August 11, but not to an extent to arouse action until that date. The cashier of the bank at Red Lake Falls, the clearing bank for the Farmers State Bank of Holt, did not feel impelled to act upon appearances until the next day when he wrote a letter of warning to the cashier of the latter bank, who in a reply admitted that he had not liked the manner in which Gesell had been doing business. The jury heard the young cashier's explanation of this reply as well as his admissions therein, and we cannot say that when they considered the appearance of the checks in suit, the conduct of the other bankers who had the same, or better, opportunities than the cashier of the Holt Bank to observe Gesell's illegitimate methods of "kiting," and the apparently ample margin he kept in that bank by means of the scheme, the conclusion could not be rightfully reached that the officers of the latter bank did not know and in the exercise of ordinary prudence as bankers were not bound to know of Gesell's fraudulent practice. Bankers do not ordinarily treat their customers as rogues. For a banker to dishonor checks drawn against a sufficient checking deposit account on mere suspicion might work harm and great loss to both customer and bank. It is also to be noted that it is not from the appearance of the checks made to and indorsed by Curtis that plaintiff's assignor could have been put on its guard, but rather by the character of the checks constituting the deposits made from day to day with it by the Stageburg Furniture Company. And as to these checks the evidence is meager as to who were the makers. The Farmers State Bank of Holt paid the checks upon which the causes of action are predicated in the usual course of business, and the inference would be that it was done in good faith. If there was anything in the character of the deposits to impute knowledge to the bank of Gesell's fraudulent practice we would expect the defense to bring that out.

Errors at the trial are also urged as grounds for a new trial. The court explicitly stated to the jury that plaintiff did not seek to hold Curtis as indorser, hence there was no need of giving any of the requests dealing with an indorser's liability. There was no evidence justifying any application of the value of certain property turned over by Gesell to plaintiff in extinguishment of the checks involved in this action, hence the requested instruction in respect to such property was properly refused. Exception is taken to a refusal to give appellant's tenth request, and to the court charging in lieu thereof as follows:

"In the present case, if you believe from the evidence that defendant Curtis engaged in the practice of letting defendant Gesell draw checks on the Farmers State Bank of Holt, in favor of J. P. Curtis, and that Curtis would then indorse same and hand them back to the said Gesell and if said Curtis knew at the time that Gesell was then engaged in the practice of kiting checks, and that the checks were to be used in said practice of kiting, then defendants were guilty of conspiracy and Curtis would be liable to the plaintiff for any loss sustained by the said Holt bank through the payment of said checks, provided you also find that the bank or its officers did not know or could not have known by the exercise of reasonable precaution that Gesell was engaged in the practice of kiting checks."

In our opinion the instruction given as applied to the facts here states the law more appropriately than the one requested. In the cross-examination of Curtis he was required over objection to disclose certain mortgage security held by him at the time of indorsing these checks. The business relations between Gesell and Curtis at the time of the transactions in suit were proper facts to be placed before the jury. Plaintiff could not well be expected to adduce direct proof of an express agreement between defendants to put into operation the fraudulent scheme adopted. The evidence inculpating defendants must of necessity be largely circumstantial, and great latitude was properly given in the cross-examination of defendants. Pfefferkorn v. Seefield, 66 Minn. 223, 68 N. W. 1072.

This appeal appears to turn entirely upon issues of fact, rightly left to the jury under clear and adequate instructions, and we fail to discover any error which calls for another trial.

Order affirmed.

RELIANCE ELEVATOR COMPANY v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.¹

December 21, 1917.

No. 20,569.

Carrier - construction of tariff.

1. Defendant has a line of railway which extends from Linton, North Dakota, through Strasburg, North Dakota, to Minneapolis, Minnesota. Its published tariff filed with the Interstate Commerce Commission names 17 cents per hundred pounds as the rate for carrying wheat from Strasburg to Minneapolis, and 16 cents per hundred pounds as the rate for carrying wheat from Linton, the next more distant station, to Minneapolis. The tariff also povides: "Between stations on the C. M. & St. P. Ry. rates to and from intermediate stations will be the same as shown to or from the next more distant station to or from which rates are named." Held that this provision applies only to shipping points to or from which a specific rate is not named and which are intermediate between stations to or from which a specific rate is named, and does not apply to Strasburg; and that the legal rate for shipments from Strasburg is the specific rate named therefor.

Same - change in tariff rates.

2. The rates for interstate shipments named in a tariff published and ¹Reported in 165 N. W. 867.

filed as provided by the interstate commerce law are valid and binding until changed in the manner provided in that law.

Commerce — unreasonable or illegal freight rates — jurisdiction.

3. Original jurisdiction to determine whether such rates are unreasonable, or discriminatory, or infringe the law in some other respect, has been withdrawn from the courts and vested in the Interstate Commerce Commission.

Same — action to recover overcharges — jurisdiction.

4. If the validity of the published rate is not questioned, the state court has jurisdiction of an action to recover the amount of an alleged overcharge.

Dismissal of action — wrong reason for right action.

5. Plaintiff, without questioning the validity of the published rate, sought to recover an alleged overcharge, but, as the stipulated facts show that it paid the legal rate and no more, the action was properly dismissed, although the court erroneously based the dismissal upon the ground that it had no jurisdiction.

Action in the district court for Hennepin county to recover \$493.51, overcharge on 69 carloads of wheat, shipped from Strasburg, North Dakota, to Minneapolis. The answer was a general denial. The case was tried before Steele, J., who at the close of the evidence granted defendant's motion to dismiss the case on the ground that the court was without jurisdiction of the subject matter. From an order denying its motion for a new trial, plaintiff appealed. Affirmed.

Thomas Kneeland, for appellant.

F. W. Root, N. J. Wilcox, J. N. Davis and Burton Hanson, for respondent.

TAYLOR, C.

Plaintiff shipped 69 carloads of wheat over defendant's railway from Strasburg, North Dakota, to Minneapolis, Minnesota, and defendant exacted and collected 17 cents per hundred pounds for transporting it. Plaintiff contends that the lawful rate for such transportation fixed and prescribed by the tariff or schedule of rates published by defendant and filed with the Interstate Commerce Commission is 16 cents per hundred pounds, and brought this suit to recover the alleged overcharge. At the trial a small amount of testimony was taken, and then the parties made a written stipulation of facts and submitted the case

thereon. The stipulation states that the questions to be determined by the court are:

- "(A) Has the court jurisdiction of the subject matter?
- "(B) Has the defendant, the Chicago, Milwaukee and St. Paul Railway Company, charged the lawful rate, according to the tariff and the law, on the shipments of the plaintiff here involved?"

The stipulation further provides that, if the court shall decide that it has jurisdiction of the subject matter and that defendant has charged in excess of the lawful rate, judgment shall be rendered in favor of plaintiff for the amount demanded in the complaint; but, if either of these questions be decided adversely to plaintiff, an appropriate judgment shall be rendered for defendant. At the close of the evidence, the trial court dismissed the action on the ground that it had no jurisdiction of the subject matter. Plaintiff made a motion for a new trial and appealed from an order denying the motion.

The conclusion at which we have arrived can perhaps be stated more briefly by taking up the second question first. Defendant has a line of railway which extends from Minneapolis in the state of Minnesota to Roscoe in the state of South Dakota and thence westward to the Pacific coast, and has a branch line which extends from Roscoe in the state of South Dakota to Linton in the state of North Dakota. The stations upon this branch line to and from which rates are named in defendant's published tariff, stated in their order from Roscoe are: Hosmer, Hillsview, Eureka, Greenway, Zeeland, Hague, Strasburg and Linton. The published tariff states that the rate for carrying wheat from Linton, the terminus of the branch line, to Minneapolis is 16 cents per hundred pounds, and that the rate for carrying wheat from Strasburg, and from each of the other stations above named, to Minneapolis is 17 cents per hundred pounds. At the argument defendant explained that Linton was given the lower rate to meet the competition of another railway at that point. The ground for this discrimination is not important in the present case, for plaintiff expressly disclaims any attack upon the validity of the rates named in the tariff, and rests its case upon the proposition that the tariff as published and filed entitled it to the rate of 16 cents per hundred pounds for the shipments in question. It bases this contention upon the following provision of the published tariff:

"Between stations on the C. M. & St. P. Ry. rates to and from intermediate stations will be the same as shown to or from the next more distant station to or from which rates are named."

Linton is the next more distant station beyond Strasburg from which a rate to Minneapolis is named; and plaintiff insists that Strasburg is an intermediate station within the meaning of the above provision, and that under that provision the rate from Linton is also the rate from Strasburg.

It is true that Strasburg is located between Minneapolis and Linton and in that sense is an intermediate station, and it may be conceded that, if the tariff names two different rates for hauling wheat from Strasburg to Minneapolis, the shipper is entitled to the cheaper rate. Tariffs for interstate shipments while prepared and published by the railway company are filed with the Interstate Commerce Commission, and are subject to the supervisory power of that commission; and a tariff published and filed as required by law and recognized by that commission as in proper form, should not be construed as prescribing two inconsistent rates for the same service, if by another obvious and equally reasonable construction the two provisions can be harmonized and both be given reasonable and proper effect. Defendant insists that the purpose of the above paragraph is to provide a rate for shipments to or from sidings, loading places and new stations which are not named in the tariff and are located between stations to or from which a specific rate is named; that if a shipment is made for which a specific rate is named that rate must be charged, but, if a shipment is made for which no specific rate is named, the rate to be charged is to be determined in the manner pointed out in this provision.

We agree with defendant that the intermediate stations referred to and provided for in this provision are those shipping points to or from which the tariff fails to name a specific rate and which are intermediate between stations to or from which a specific rate is named; that, if a shipment is made for which a specific rate is named, such specific rate must be charged; that if a shipment is made for which a specific rate is not named, then this provision steps in and designates the rate, "to

or from the next more distant station to or from which rates are named," as the rate to be charged. New shipping points are constantly being established, and, in the absence of some such general provision, shipments to or from such points could not be accepted until the rates therefor had been published and filed as required by law. Texas & Pac. Ry. Co. v. American Tie & Timber Co. 234 U. S. 138, 34 Sup. Ct. 885, 58 L. ed. 1255. The Federal Circuit Court of Appeals for this circuit has recently considered this same provision of this same tariff and held that it applied only to intermediate shipping points between the stations specifically named in the tariff. National Ele. Co. v. Chicago, M. & St. P. Ry. Co. 246 Fed. 588. We are satisfied that the above is the proper construction to be given to this provision, but, even if we were not so satisfied, we should feel constrained to follow the decision of the Federal court, for the reason that the question involved is essentially a Federal question. This construction also accords with the rules and regulations of the Interstate Commerce Commission. It follows that defendant charged and collected the legal tariff rate for the shipments in question.

Defendant contended in the trial court and also contends in this court that the interstate commerce law gave the Interstate Commerce Commission exclusive jurisdiction over the questions in controversy; and that the courts, or at least the state courts, have no jurisdiction of the subject matter of the action.

It is thoroughly settled that the rates for interstate shipments named in the tariffs published and filed as required by the interstate commerce law, are the legal rates for such shipments, and cannot be deviated from by either shipper or carrier until changed in the manner prescribed in that law; and that a shipper who seeks to attack such published rates upon the ground that they are unreasonable, or discriminatory, or infringe the law in some other respect, must make his complaint to the Interstate Commerce Commission before he can resort to the courts, for the reason that original jurisdiction over such questions has been withdrawn from the courts and vested in the commerce commission. Texas & Pac. Ry. Co. v. Abilene Oil Co. 204 U. S. 426, 27 Sup. Ct. 350, 51 L. ed. 553, 9 Ann. Cas. 1075; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 32 Sup. Ct. 1141, 56 L. ed. 288; Mitchell Coal

& Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 33 Sup. Ct. 916, 57 L. ed. 1472; Texas & Pac. Ry. Co. v. American Tie & Timber Co. 234 U. S. 138, 34 Sup. Ct. 885, 58 L. ed. 1255; Loomis v. Lehigh Valley R. Co. 240 U. S. 43, 36 Sup. Ct. 228, 60 L. ed. 517; Baltimore & O. R. Co. v. Pitcairn Coal Co. 215 U. S. 481, 30 Sup. Ct. 164, 54 L. ed. 292; Morrisdale Coal Co. v. Pennsylvania R. Co. 230 U. S. 304, 33 Sup. Ct. 938, 57 L. ed. 1494.

But where the validity of the published rate is conceded and the shipper merely seeks to recover an excess which he alleges that the carrier has exacted and collected over and above such published rate, section 22 of the interstate commerce law saves to him the right to bring his action therefor in the state court. Pennsylvania R. Co. v. Sonman S. C. Co. 242 U. S. 120, 37 Sup. Ct. 46, 61 L. ed. 188; Pennsylvania R. Co. v. Puritan Coal Min. Co. 237 U. S. 121, 35 Sup. Ct. 384, 59 L. ed. 867; Eastern Ry. Co. v. Littlefield, 237 U. S. 140, 35 Sup. Ct. 489, 59 L. ed. 878; Illinois Cent. R. Co. v. Mulberry Hill Coal Co. 238 U. S. 275, 35 Sup. Ct. 760, 59 L. ed. 1306; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 33 Sup. Ct. 916, 57 L. ed. 1472; Gimbel Bros. v. Barrett (D. C.) 215 Fed. 1004; Hite v. Central R. of New Jersey, 171 Fed. 370, 96 C. C. A. 326; Wolverine Brass Works v. Southern Pac. Co. 187 Mich. 393, 153 N. W. 778; Western & Atlantic R. Co. v. White Provision Co. 142 Ga. 246, 82 S. E. 644; Kansas City Southern Ry. Co. v. Tonn, 102 Ark. 20, 143 S. W. 577.

In the present case the pleadings raised no question as to the validity of the rate fixed by the tariff, and the only issue presented for trial was whether defendant had collected an amount in excess of the prescribed rate. In National Ele. Co. v. Chicago, M. & St. P. Ry. Co. supra, the court held that the Federal court had jurisdiction to determine that question, and we are of opinion that the state court also has jurisdiction to determine it.

The trial court dismissed the action without prejudice. Neither party is in position to complain of this disposition of the case, as plaintiff has failed to establish a cause of action, and defendant has taken no appeal. The order denying a new trial is affirmed.

DODGE ELEVATOR COMPANY v. HARTFORD FIRE INSURANCE COMPANY.¹

December 21, 1917.

No. 20,585.

Insurance — grain in car after issue of bill of lading — construction of policy.

A fire insurance policy covered grain owned by the insured while contained in its elevators, warehouses or sheds, "or while in cars on tracks within 100 feet thereof." Fire destroyed the elevator and grain in a railway car on a track within 100 feet thereof. This grain had been loaded by the insured for shipment and a bill of lading had been issued by the railway company. Insured was the consignee as well as the consignor, and owned the grain in the car. It is held:

- (1) The grain in the car was covered by the policy.
- (2) There was no change in the interest or title of the subject of insurance, and no such change in the possession thereof as avoids the policy under the "alienation" clause.

Action in the district court for Hennepin county to recover \$617.48 upon a fire insurance policy. Defendant's demurrer to the complaint was overruled, and Molyneaux, J., certified that the question presented by the demurrer was important and doubtful. Affirmed.

M. H. Boutelle, for appellant.

Cray & Eaton, for respondent.

Bunn, J.

The trial court overruled the demurrer of defendant to the complaint and certified that the question presented was in its opinion important and doubtful. Defendant appeals from the order.

The action was to recover for the loss by fire of a carload of wheat standing on a railroad track within 100 feet of plaintiff's elevator at Bathgate, North Dakota. The complaint set out the policy in full.

¹Reported in 165 N. W. 487.

It insured plaintiff against loss or damage by fire upon grain, etc., "their own or held by them in trust or on commission, or sold but not removed, or held in storage; if in case of loss the assured is liable therefor; while contained in the elevators, warehouses or sheds specifically described in the schedule hereto attached, or while in cars on tracks within 100 feet, thereof." The facts in relation to the destruction by fire of this car of grain are stated as follows:

On the tenth day of September, 1915, the plaintiff loaded into Great Northern Railway Company's car No. 16,239, 1,317 bushels of wheat, and said car then and there stood on the service track running to said elevator and within 25 feet of said elevator. On said day the plaintiff filled out a certain bill of lading covering said car, and on the eleventh day of September, 1915, plaintiff presented said bill of lading to the railway company, and on the same day at about 10 a. m. the bill of lading was signed by the agent of the railway company, and the words "Protected over night by locks" written therein. The bill of lading shows that the car was consigned to plaintiff at Minneapolis, plaintiff also being the consignor. The fire occurred about five o'clock in the afternoon of September 11. It destroyed the elevator and the car of wheat.

Defendant contends (1) that the car of wheat was not covered by the policy; (2) if it was, the facts stated show a breach of the conditions against change of interest or possession.

1. Counsel for defendant argues that the provision of the policy extending the liability of the insurer to grain in cars on tracks within 100 feet of the elevator has exclusive reference to grain the legal status of which was identical with that stored in the elevator or otherwise on the premises; and does not apply to grain loaded in cars and delivered to a carrier for shipment. He claims that this was grain in transit, that the carrier was liable as insurer, and that defendant was not. It seems to us that to adopt this view would be adding a condition to the policy. It says that grain in cars is insured. To hold that this does not mean grain which the insured has loaded in cars for the purpose of shipment, but only grain that happens to be in cars instead of in the elevator, is doing violence to the plain terms of the policy. We do not see that the legal status of this grain was materially different from that of any other grain on the insured premises. Counsel claims

that, to make the insurer liable, it must be grain for the loss of which the insured would be responsible, and that as the grain had been delivered to the carrier the responsibility of the insured was at an end. This argument is based upon the above quoted language of the policy: "If in case of loss the assured is liable therefor." Defendant claims that this clause applies to grain owned by the assured, but it is plain that it applies only to grain not belonging to the insured, as that "held * *.* in trust or on commission, or sold but not removed." Where the grain is owned by the insured, there is no sense in speaking of the insured being liable for its loss. This grain still belonged to plaintiff, and was in a car within 100 feet of the elevator. We have considered quite carefully the rather ingenious argument of counsel, but find it unnecessary to follow it further. The grain to recover for the loss of which the action is brought was covered by the policy.

2. The policy contained the standard provision making the policy void if any change takes place in the "interest, title, or possession of the subject of insurance." There was manifestly no change in "interest" or "title" but defendant contends there was a change in "possession." We think that this clause has no application to such a technical change of possession as there was when the car was loaded and the bill of lading issued. The owner had as much interest as ever to be protected by insurance. It was clearly contemplated that grain would be loaded into cars and shipped, and as clearly provided that the insurance covered grain so loaded, as long as the cars remained within the specified distance of the elevator. We see nothing in the authorities cited by counsel that warrants a different conclusion.

Order affirmed.

CELESTINE THILL AND OTHERS v. GEORGE FREIERMUTH AND OTHERS.¹

December 21, 1917.

No. 20,634.

Deed — undue influence — res adjudicata.

The evidence in this case sustains the finding of the trial court that a deed from father to son was procured by undue influence. A similar decision on a former trial was reversed by this court on the ground that it was not sustained by the evidence. The evidence on the second trial was not the same. The former decision of this court is not res adjudicata. Whether the former decision would be res adjudicata if the evidence were the same on both trials is not decided.

After the former appeal, reported in 132 Minn. 242, 156 N. W. 260, the case was tried before Johnson, J., who at the close of the testimony denied defendant's motion for judgment, made findings and ordered judgment in favor of plaintiffs. From an order denying their motion to amend the decision and for judgment in their favor, or for a new trial, defendants appealed. Affirmed.

T. R. Johnson and W. H. Gillitt, for appellants. Kueffner & Marks, for respondents.

HALLAM, J.

This case was before this court on a former appeal. 132 Minn. 242, 156 N. W. 260. The facts are there fully stated. Many years ago, Columbus Freiermuth and Brigetta, his wife, both now deceased, settled on land in Dakota county. There they reared a large family and acquired a farm of 400 acres. As the children grew up all left home except one son, the defendant George. For about 25 years George rented the farm, first on shares, and later at a rental of \$600 a year. While a tenant, he made improvements on the land of the value of several thousand dollars. Some of these improvements, it was stipu-

¹Reported in 165 N. W. 490.

lated, he should have a right to remove upon the termination of his occupancy as tenant. There were two residences upon the farm. The parents lived in a house separate and apart from that occupied by defendant and his family until the spring of 1911, when the mother died. After that the father went to live with defendant. While living there and on November 9, 1911, he conveyed the 400 acre farm to George for a consideration of \$18,000 and took two notes of \$9,000 each, payable 10 years after date with interest at 2 per cent per annum. The court found the value of the land with the improvements thereon to be \$30,000.

In 1908 deceased made a will, to which his wife consented in writing, in which all living children were treated substantially alike. At the time of making the deed to defendant, he made a second will dividing what remained of his property with substantial equality among his children. On March 30, 1912, deceased indorsed a payment of \$3,000 on one of the \$9,000 notes. The record shows no trace of this \$3,000 and the court found that the amount was never paid. At about the time of this alleged payment, deceased made a third will giving George a legacy of \$1,000 and dividing the residue, giving surviving children interests nearly alike.

This action is brought to set aside the deed on the ground of undue influence exerted by defendant George and Margaret, his wife. The trial court, hearing all the issues in the case without a jury, found for plaintiffs. Defendants appealed and on appeal this court reversed the decision, holding that the evidence of undue influence was not sufficient to sustain the finding.

The case was retried before the same judge. The testimony adduced on the former trial was substantially presented again. Additional testimony was offered on both sides. The additional testimony offered on behalf of the plaintiffs related mainly to proof of impaired mental capacity on the part of deceased. This, of course, had a bearing on the subject of undue influence, since conduct may constitute undue influence upon one of feeble mentality, though the same conduct might not constitute undue influence upon one of large mental capacity. The court again found for plaintiffs.

Our former decision, that the evidence then before the court was in-

sufficient to make out a case, is not res adjudicata on this appeal now that the evidence is different. McNamara v. Pengilly, 64 Minn. 543, 67 N. W. 661; Kray v. Muggli, 84 Minn. 90, 86 N. W. 882, 1102, 54 L.R.A. 473, 87 Am. St. 332. We do not say that if the evidence were the same we should be obliged to upset a second decision deliberately made. There is an element of discretion involved in setting aside a decision on the ground of insufficiency of evidence. If the case had been tried by two juries, we should not be obliged to set aside a second verdict rendered on the same evidence. The doctrine of former adjudication would not there apply. Atwood Lumber Co. v. Watkins. 94 Minn. 464, 103 N. W. 332; Stuelpnagel v. Paper, Calmenson & Co. 111 Minn. 3, 126 N. W. 281. See Mullen v. Otter Tail Power Co. 134 Minn. 65, 158 N. W. 732. However that may be, we are of the opinion that, upon the evidence now before us, we should not again reverse the decision of the trial court. There is some evidence tending to prove undue influence. The trial court, after hearing and seeing all the witnesses and after a very thorough second trial and apparently a very painstaking consideration of all the evidence, old and new, was of the opinion that there was undue influence and that the conveyance should be set aside. We think this decision should be allowed to stand. Order affirmed.

TRUSTEES OF GERMAN EVANGELICAL LUTHERAN ST.
JOHN'S CONGREGATION AND ANOTHER v. MERCHANTS
NATIONAL BANK.1

December 21, 1917.

No. 20,635.

Bank and banking — certificates of deposit — to whom payable — alteration — admission of evidence.

Action to recover the amount of certificates of deposit issued by defendant to German Lutheran Cemetery payable to its treasurer and its president, and paid by defendant to the treasurer alone, the certificates having been altered by him so that as presented they were payable to the treasurer or the president. It is held:

¹Reported in 165 N. W. 491.

- (1) Conceding that defendant could have rightfully paid the certificates without an indorsement, it was bound to pay to the person or persons authorized by the terms of the certificates to receive payment. Payment to the treasurer was not justified unless he was by the terms of the certificates so entitled to receive payment, and it is not material that he was in fact the treasurer of the cemetery and as such in charge of its funds, or that defendant so believed. It was not error to receive in evidence a certain resolution, or the testimony of the president as to instructions given defendant's teller as to whom the certificates should be made payable.
- (2) The certificates belonged to plaintiffs, under the name of German Lutheran Cemetery. The treasurer and president were their agents to receive payment, and plaintiffs, for their own protection, had provided against payment to either without the consent of the other. Under these circumstances a payment to either agent alone, without the other's consent, does not discharge the bank's liability to the principal.
- (3) The evidence justified a finding that the treasurer never paid over to plaintiffs or accounted for the moneys received on the certificates.
- (4) Defendant cannot complain that the trial court instructed the jury that plaintiffs could not recover unless defendant was negligent, though, if the certificates were altered after they were issued so as to make them payable to either the treasurer or the president, the defendant is liable even though it was not negligent. There was no prejudice to defendant in receiving evidence on this issue, or in instructing the jury thereon.
- (5) There was no error in instructions to the jury as to certain of the certificates which as presented for payment did not have the word "or" between the names of treasurer and president.
- (6) The court did not err in allowing plaintiffs' interest at 6 per cent from the date of the demand upon defendant.

Action in the district court for Ramsey county by the trustees of two Lutheran churches to recover \$7,650, the value of certain certificates of deposit purchased from defendant.

The complaint alleged that the moneys for which the certificates were issued were known by defendant to be the property of plaintiffs and of the German Lutheran Cemetery board, and J. Brandtjen and C. Gerstermeier, to whose order the certificates were issued, had no interest therein; that when the certificates were issued defendant neglected to ascer-

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tain from plaintiffs or the cemetery board the authorized indorsement of that board upon which they might be paid, and further neglected to obtain from plaintiffs and the cemetery board a proper signature card, showing upon whose indorsement such certificates should be paid; that it is the custom of all banks, including defendant bank, to keep an accurate record of all certificates of deposit issued, showing the date of issue, number of certificate and the name or names of payees; that defendant carelessly failed to keep such record and that the certificates were carelessly written by defendant and so filled in that they could be easily altered; that defendant without the knowledge or authority of plaintiff paid the certificates to Gerstermeier without the authorized indorsement of the cemetery board; that about January 30, 1914, he altered and forged the certificates by inserting the word "or" between the names of , John Brandtjen and C. Gerstermeier, thereby materially changing the tenor of the certificates, and about that day defendant negligently paid the altered instruments to Gerstermeier, who appropriated the proceeds to his own use and is now hopelessly insolvent.

The answer alleged that all the certificates upon their face when issued were payable to C. Gerstermeier, treasurer, or J. J. Brandtjen, president, and all were paid in full upon proper indorsement according to their tenor, that they were issued upon and in accordance with the instructions of Gerstermeier, who personally deposited the amounts of money paid therefor, and transacted the business connected with them, and no other person appeared to the defendant in connection therewith; that at all times Gerstermeier was the treasurer of German Lutheran Cemetery, and had full control of the moneys and disbursements in connection with its business, and made all deposits with defendant and all withdrawals of the same, and had full power to indorse all checks for the cemetery and did indorse all the certificates as treasurer of the cemetery; that defendant had no notice or knowledge of any limitations upon the powers of Gerstermeier as such treasurer, and the cemetery and all the directors had full notice of all his dealings as treasurer with defendant.

The case was fried before Olin B. Lewis, J., who at the close of the testimony denied defendant's motion for a directed verdict, and a jury which returned a verdict for \$7,461.15. From an order denying its motion for judgment notwithstanding the verdict and granting its motion

• for a new trial unless plaintiffs consented to a reduction of the verdict to \$6,762, defendant appealed. Affirmed.

John F. Fitzpatrick, for appellant.

Morphy, Bradford & Cummins, for respondents.

BUNN, J.

Plaintiffs are church corporations and jointly own and manage by means of a board of directors of eight members, four from each church, the German Lutheran Cemetery in St. Paul. This board elects a president and treasurer. The by-laws provide that 20 per cent of the selling price of lots in the cemetery shall be set aside and become a part of a fund to be known as "The Continuous Care and Improvement Fund," that this fund shall be invested in safe securities and the interest used for the purpose of keeping lots in good condition and for the general improvement of the cemetery. Until changed in 1913, the by-laws provided that this fund "shall be in the care of the treasurer, who shall be sufficiently bonded in a surety bonding company, amount to be determined by Board of Directors." In January, 1913, this by-law was amended by a resolution passed by the two congregations transferring the managing control of the continuous care fund to the treasurer, together with the president of the board of directors, and dispensing with the treasurer's bond until otherwise decided. Prior to this resolution, the treasurer, Carl Gerstermeier, had control of the fund, and saw to its investment in certificates of deposit and other securities. Though by another by-law all checks had to be signed by both the president and the treasurer, the latter received the moneys, and the certificates were made payable on his indorsement. A number of certificates of deposit had been purchased by Gerstermeier as treasurer from the defendant bank, made payable to the cemetery on return of the certificate indorsed by Gerstermeier, treasurer. Early in 1913, after the passage of the above resolution, John Brandtjen, the president of the board, and Gerstermeier, according to the testimony of Brandtjen, visited the defendant bank for the purpose of purchasing certificates of deposit, and Brandtjen told the teller that they wanted the certificates issued to the German Lutheran Cemetery, "making them in joint control of both the treasurer and the president, so that it would require the signatures of the treasurer and president to

either cash or renew these certificates." Certificates were purchased about this time, and made payable "to the order of C. Gerstermeier, Treas. J. Brandtjen, Pres."

Thereafter and during 1913, 1914 and 1915, other certificates of deposit were purchased by Gerstermeier. Twenty-two of these certificates were paid by defendant to Gerstermeier, on his presentation of them indorsed "German Lutheran Cemetery, C. Gerstermeier, Treas." Gerstermeier appropriated to his own use the funds so received in payment of these certificates, and plaintiffs never recovered any part of the amount, Gerstermeier being insolvent.

This action was brought to recover of defendant bank the amounts of the 22 certificates so paid to Gerstermeier. The gravamen of each of the 22 causes of action was that the certificate involved therein was not by its terms payable to Gerstermeier, but was payable to him and Brandtjen. Negligence in various particulars was charged against defendant. At the close of the evidence on the trial, the court eliminated 10 of the causes of action, for the reason that the 10 certificates involved showed that they were made payable to the order of Gerstermeier, Treas. or Brandtjen, Pres. The 12 remaining causes of action were submitted to the jury. The certificates involved in these causes of action either have on their face evidence of an alteration by erasure and the insertion of the word "or" between the names of Gerstermeier and Brandtjen, or the word "or" did not appear between the names. Where this word did appear, but there was evidence that it had been inserted either after an erasure or without, the court in substance submitted the case to the jury on the issue of negligence, making defendant's liability depend on whether it failed to use ordinary care to discover the alteration. The verdict was for the plaintiffs in the sum of \$7,461.15. This was reduced by the trial court to \$6,762, remitting a part of the interest allowed by the jury. Defendant's motion for judgment notwithstanding the verdict or for a new trial was denied, and this appeal prosecuted from the order.

1. Defendant's first point is that the certificates of deposit could rightfully be paid by the bank to the payee without an indorsement. This is on the ground that the certificates do not say that they were payable to "C. Gerstermeier, Treasurer, and J. Brandtjen, President," when properly indorsed, but that they were payable to their order when prop-

erly indorsed. In other words, an indorsement is only necessary when the certificate is presented for payment by an indorsee. This may all be conceded. The point is not as to by whom the certificates were indorsed when presented for payment, except as that fact might show the bank that payment was authorized. The material thing is that the certificates be paid to the persons or person authorized by their terms to receive payment. If payment is made to the right person, according to the terms of the certificate, the bank performs its duty and it would not matter whether it was indorsed. If, on the contrary, payment is made to a wrong person, one not entitled by the terms of the certificate to receive payment, the liability of the bank is clear. It is all a question of to whom the certificates were payable. If a check or draft is payable to the order of John Smith, the bank might require his indorsement before paying him the amount, but it would be protected if it paid him without his indorsement. But if the check or draft was presented by another than the pavee, with no indorsement or a forged indorsement, the bank would pay at its peril. We do not see why that is not the present case, so far as this point is concerned.

The same answer is applicable to the argument that Gerstermeier was in fact the treasurer of the cemetery and had the handling of its funds. Even without the resolution of January, 1913, and the evidence of the information given the bank as to how the certificates should be made payable, and assuming that the bank was justified in believing and did believe that Gerstermeier, as treasurer, was entitled to receive all funds of the cemetery, the question still comes back to this: To whom were the certificates payable by their terms? If not to Gerstermeier, payment to him would not be justified because he was believed to be entitled, as treasurer, to receive payment.

The resolution of January, 1913, and Brandtjen's evidence of his directions to the teller to make out the certificates so that they could not be paid without the indorsement of both the treasurer and the president, are items of evidence that had a clear bearing on the chief question at issue, as to whom the certificates in question were made payable. There was no error in receiving this evidence. Whether it was properly admitted on the issue of negligence depends upon whether there was any such issue, a question to be referred to later.

- 2. Another contention of defendant is that, as to certificates payable to Gerstermeier and Brandtjen jointly, a payment to either was justified. The rule that where there are several joint pavees a payment to either will discharge the debt is relied on. But here German Lutheran Cemetery, the name under which plaintiffs were doing the business, was the real payee, the owner of the certificates. Brandtjen and Gerstermeier were simply agents for plaintiffs, who had seen fit for their own protection to provide against payment to either without the consent of the other. This is not an unusual situation, and we see no possible answer to the proposition that a payment to either agent, without the consent of the other, does not discharge the bank's liability to the principal. It would hardly seem necessary to refer to authorities in support of this proposition. The case of Rollins v. Phelps, 5 Minn. 373 (463), announces the rule that an authority conferred upon several joint agents must be exercised by them all, and any act done by a less number will be void as against the principal. We are aware of no subsequent case in this state that changes this rule. Robbins v. Horgan, 192 Mass. 443, where a payment to one of two joint agents was held not to discharge the payee's liability to the principal, is much in point. 7 C. J. 675, et seq., and cases cited. The case at bar is stronger than those referred to, as here we have the element of a clearly expressed intention to safeguard the interests of the principal by the requirement that payment be not made to either agent alone. In the last analysis, the case is one of payment to a person not authorized to receive it. It is elementary that this does not discharge the debt. McMahon v. German American Nat. Bank of Little Falls, 111 Minn. 313, 127 N. W. 7, 29 L.R.A.(N.S.) 67, 7 C. J. 650.
- 3. It is contended that the evidence conclusively showed that Gerster-meier accounted to plaintiffs for the money he received on the certificates of deposit, and that the loss of plaintiffs comes from his defalcation more than a year afterwards. This claim is based on the fact that Gerster-meier's accounts as treasurer were examined and found correct some time after the money had been received on the certificates. But it does not follow because the treasurer's books showed no shortage, that he had accounted for the money received on the certificates. There was evidence that plaintiff had never received any part of the money received by Gerstermeier on the certificates. This question was submitted to the jury,

the instruction being that plaintiffs could not recover if Gerstermeier accounted to them for the funds after the certificates were paid to him, even though he afterwards took the funds from the treasury. The jury decided this issue in plaintiff's favor, and the evidence sustains this decision.

4. Defendant now contends that there was no issue of negligence in the case, and that it was error to submit this issue to the jury. We are inclined to agree that it was not necessary for plaintiffs to show negligence in order to recover. If the certificates of deposit had been in fact altered by the insertion of the word "or" between the names of Gerstermeier and Brandtjen, so as to make them payable to either, instead of to both jointly, defendant would be liable without reference to the question. of its negligence. The case is not different from what it would have been had the certificates been presented for payment with the indorsement of one or both names forged. In the absence of negligence on the part of the plaintiffs, the liability of the bank is clear, even though it was not negligent. 7 C. J. 683, et seq., and cases cited. Lennon v. Brainard, 36 Minn. 330, 31 N. W. 172. But defendant has no just complaint either because evidence was received tending to show its negligence, or because the court made a finding of negligence essential to a recovery as to the certificates in which the word "or" appeared to have been inserted after they were issued. The court made it very clear to the jury that defendant was not liable on account of the payment of these certificates unless it was found that they had been altered as stated. Under the instructions the jury, in order to decide for plaintiffs, was obliged to find both that the certificates had been thus altered, and that defendant was negligent. If this was error, plaintiffs might have cause for complaint had the verdict been against them, but clearly defendant has none. Nor is there anything in the suggestion that the interjection of this issue tended to prejudice the jury against defendant. The vital issue of alteration was too clearly submitted to the jury to justify an inference that there was any prejudice. Furthermore an inspection of the various certificates, with the evidence in relation to the erasures and alterations, makes it well nigh conclusive that the certificates had been altered as stated.

- 5. As to three of the certificates the court instructed the jury to find for plaintiffs. These certificates did not show the word "or" between the names of the payees. Defendant's complaint here is that the amount of these certificates was paid by a cashier's check made to the order of "German Lutheran Cemetery," delivered to Gerstermeier, indorsed by him and paid by another bank in which the cemetery kept a checking account. We do not find evidence which indicates that this check was deposited to the credit of this account, but in any event we think that the court by the instruction, before referred to, given at the end of the charge, that plaintiffs could not recover if Gerstermeier had accounted to or paid them the amounts received from the certificates, qualified the instruction as to defendant's liability on these three certificates.
- 6. The only remaining point that requires specific mention is the matter of interest. The court charged that if plaintiffs were entitled to recover, interest at 6 per cent from the date Gerstermeier appropriated the money should be allowed. The verdict included interest to the amount of \$1,061.15, found by the court to be some \$17 in excess of 6 per cent interest from the dates the certificates were paid to Gerstermeier. This amount was reduced by the court to \$362, being interest at 6 per cent from the date plaintiffs demanded payment from defendant. Defendant claims that the rate of interest provided in the certificates, $3\frac{1}{2}$ per cent, should be applied. We see no basis for this contention. The certificates did not draw any interest after 6 months from their dates. Any possible error in the instructions on this subject was more than cured by the reduction of the verdict. We think interest at the legal rate from the date of the demand was properly allowed.

In conclusion, our opinion is that the evidence sustains the verdict, and that there was no error prejudicial to defendant either in the rulings on the trial or in the charge. There is no valid ground upon which we can disturb the result reached in the court below.

Order affirmed.

STATE v. J. W. KEARNS.1

December 21, 1917.

No. 20,656.

Criminal law - gambling - charge to jury.

The charge of the court discussed the evidence and indulged in inferences to a greater extent than is commendable, but it emphasized to the jury that all questions of fact were for their determination and impressed so strongly that if certain contentions of defendant were true they must acquit, that this court cannot say there was error prejudicial to the defendant.

Defendant was indicted by the grand jury of Polk county for the crime of permitting a gambling device to be set up on certain premises, tried in the district court before Watts, J., and a jury which found defendant guilty as charged in the indictment. From an order denying his motion for a new trial, defendant appealed. Affirmed.

Lyndon A. Smith, Attorney General, James E. Markham, Assistant Attorney General, and G. A. Youngquist, County Attorney, for respondent.

HALLAM, J.

Defendant was convicted of the crime of permitting a gambling device or gaming table to be set up and used upon his premises at which the game of poker is played. The evidence was conflicting. The defendant "does not upon this appeal question the sufficiency of the evidence to support the verdict." The only objection raised is to the charge of the court. To understand the charge it is necessary to note some of the evidence.

Defendant conducted a pool room in East Grand Forks. Soft drinks, confectionery and cigars were sold. The place was "open all night." In the rear of the pool room was a card room with four public card tables. The evidence varies as to the kind of games played there and as to the extent to which stakes were played for there. This is not of great

¹Reported in 165 N. W. 480.

importance, for the case of the state rests upon evidence that tables were set up and used for gambling in a large front room in the basement. This room extends to the front property line. Adjoining it and under the sidewalk is another connecting room. Beyond that and in the street are the usual gas mains. Just how near these were to the outside wall does not appear. Defendant's evidence is that there was formerly a gas connection from the street to the building but that, before this offense is charged to have been committed, the gas had been shut off in the street "outside the curb." These facts are material in this way. Several witnesses for the state testified to being in this room for as much as 2 hours and that gambling was carried on there. Defendant denied this and testified that this room had for years been so permeated with gas from a leak in the gas main in the street that no one could sit in it for any considerable length of time. A local physician and the sheriff testified that they were in this room at times later than the time of the offense charged and that when they were there the room was so permeated with gas that a person could not stay there 2 hours.

The judge in his charge to the jury instructed them clearly that they were the exclusive judges of all questions of fact and instructed them properly as to the presumption of innocence and the degree of proof necessary to establish guilt. Referring to the testimony he said that, "the testimony of Dr. Kirk and Sheriff Kelly" and others "would very strongly show that the gas in that room was so strong when they were there, that it would be impossible that persons could play cards as the witnesses on the part of the state say they did, in that room," and that, if gas was there at all times as these witnesses testified it was, "then the witnesses for the state are either mistaken or wilfully falsifying when they stated they were in there and played cards for a couple of hours," and then he told them it was for them to say whether there was gas in that room continuously as claimed on the part of the defendant, "or whether or not the testimony on the part of the defense, as they give it, itself, throws suspicion upon the honesty of their case. Use your own common sense with regard to that. The testimony of Mr. Kearns is, in explaining where the gas comes from, that the gas main in the street in front of these premises burst some time ago and there was a leak in it, and that there was manure filled in the street there, and, if I remember his testimony right, he claims that the gas comes from that. Well, now, will gas come through a wall, if there are no cracks in the wall? Use your common sense and what you know of things, and know of that—would gas go through from the street, into this building unless there were cracks in the wall, and if there were cracks in the wall which permitted it to go through and into the building, how much trouble would it be to fill up those cracks and keep any gas from coming in? Use your common knowledge and common sense with regard to that, and decide whether or not anybody owning such a building as is described in the evidence here belongs to the defendant, leave it so that gas could come into the building itself and leave the rooms in it, such as witnesses found the room when they were in it, that is, this room where the witnesses on the part of the state claim the gambling was done. Would any person, with what trouble there would be necessary to keep the gas out of it, permit it to come in and make the room so that people would find it very disagreeable to stay in it?" And he concluded: "If the claim on the part of the defendant is correct, that gas was in there all times the same and was not fixed so it could be controlled or let in or shut off at any time, the verdict would be in favor of defendant, but if you find that the testimony on the part of the defendant, from your own experience and good judgment, would rather indicate that it shows dishonesty in their defense, then you should take that in consideration in deciding the case.

"So on the whole, if you are satisfied from the evidence in the case beyond a reasonable doubt that the defendant is guilty you should find the verdict" of guilty.

It is claimed this charge was argumentative and did not allow the defendant a fair trial and a free and untrammelled verdict by the jury. The charge is not to be commended. In much detail it indulges in inferences that might be drawn in favor of both the state and the defendant. Still the court emphasized that all questions of fact were for the jury and impressed upon them so strongly that they must acquit if defendant's testimony as to the constant presence of gas was true, that we cannot say there was error prejudicial to the defendant. State v. Yates, 99 Minn. 461, 109 N. W. 1070, and State v. Jones, 126 Minn. 45, 147 N. W. 822, cited by defendant were quite different.

Order affirmed.

JOHN B. GROSE v. J. KOLLER.1

December 21, 1917.

No. 20,664.

Broker - contract for compensation.

1. The evidence sustains the finding of the jury that the plaintiff's services in securing an exchange of lands were performed under a contract with the defendant contemplating compensation in the event of a successful result and not as a mere voluntary or friendly service nor under an agreement for a specific sum based on the exchange value of the defendant's property.

Evidence - charge to jury.

2. There were no prejudicial errors in rulings on evidence nor in the charge to the jury.

Action in the district court for Renville county to recover \$1,000 for services as broker. The answer denied that plaintiff's services in connection with a certain exchange of properties was worth \$1,000 or any amount whatever. The case was tried before Comstock, J., who at the close of the testimony denied plaintiff's motion for a directed verdict in an amount to be fixed by the jury, and a jury which returned a verdict for \$850. From an order denying his motion for a new trial, defendant appealed. Affirmed.

Edward C. Farmer and Seager & Seager, for appellant.

F. M. Freeman and L. J. Lauermann, for respondent.

DIBELL, C.

This is an action to recover the reasonable value of the plaintiff's services as a broker in securing an exchange of the defendant's property. There was a verdict for \$850 for the plaintiff. The defendant appeals from the order denying his motion for a new trial.

1. The defendant owned a mill property and wanted to sell it. He offered the plaintiff all he could get for it in excess of \$5,000 upon a

¹Reported in 165 N. W. 488.

cash sale. The plaintiff failed to effect a sale, but hearing of a possible opportunity of making an exchange for farm lands informed the defendant. He was interested and took the matter up with the plaintiff who introduced him to Shendel and Springer, the owners. The plaintiff and defendant and Shendel and Springer went to the lands and examined them. This ended the plaintiff's actual work in connection with the transaction. A few days later Shendel and Springer examined the mill property. Adjoining it was a residence owned by the defendant. An arrangement was made whereby the mill property and the residence were exchanged on a basis of \$8,000 for the mill and residence property and \$24,000 for the farm lands.

That the plaintiff brought the defendant and Shendel and Springer together with a view of exchanging properties is not questioned. It was not a mere voluntary or friendly service—at least the evidence does not require a finding that it was. It is rather to the contrary. Neither was the understanding that the plaintiff should have for his services in the exchange the sum for which the mill was valued in excess of \$5,000. The agreement for compensation based on a price in excess of \$5,000 related to a cash sale. The evidence sustains the finding that the services of the plaintiff were performed under circumstances indicating a mutual understanding that there should be reasonable compensation for them if they brought results.

2. We find no prejudicial errors in rulings on evidence or in the charge of the court. In one or more particulars, to which the defendant calls attention, the charge was not technically accurate, but upon the whole it covered the issue with substantial accuracy and the jury was not misled or the defendant prejudiced.

Order affirmed.

STATE EX REL. GEORGE S. SULLIVAN AND OTHERS v. BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 16, WRIGHT COUNTY, AND OTHERS.¹

December 28, 1917.

No. 20.639.

School district — issue of bonds — resolution of board — statute construed.

The issuance of bonds to construct a school-house was voted at a meeting of a school district by a majority of the legal voters. No previous action had been taken by the officers of the district. In mandamus against the school board to compel such issuance it is held, construing G. S. 1913, §§ 1855, 1968, that the issuance of bonds must be initiated by the board and that a resolution declaring the expediency such as is contemplated by section 1855 must be passed before a vote of the district; and that without such prior resolution a vote at a school meeting to issue bonds is ineffective and does not under section 1855 nor under section 1968 authorize the board to issue bonds.

Upon the relation of George S. Sullivan and others the district court for Wright county granted its alternative writ of mandamus commanding the board of education of Independent School District No. 16 to issue and negotiate a sale of bonds pursuant to the special election held by the electors of that district under section 2711, G. S. 1913. Respondents answered and relators demurred to part of the answer. From an order, Fish, J., of the Fourth judicial district, granting defendants' motion to quash the writ, relators appealed. Affirmed.

H. S. Whipple, for appellants.

W. H. Stewart and J. E. Madigan, for respondents.

DIBELL, C.

Mandamus to compel the respondents to issue bonds. There was an order quashing the alternative writ and the relators appeal.

¹Reported in 165 N. W. 880.

The respondents are members of the board of education of an independent school district in Wright county. The relators are freeholders and voters of the district. At a school meeting called by 5 freeholders pursuant to G. S. 1913, § 2711, bonds were voted for the building of a school-house. These are the bonds which the board refuses to issue and the issuance of which it is sought to compel.

The authority of the board to issue bonds rests upon two statutes. By G. S. 1913, § 1855, it is provided:

"When the governing body of any municipality shall have resolved that it is expedient to borrow money, for one or more of the purposes hereinafter named, and to an amount which will not increase its net indebtedness beyond the limit fixed by law, and a proposal so to do, if required by law, shall have been duly submitted to and approved by the voters thereof, the bonds of such corporation may be issued and sold, conformably to the provisions of this chapter, to the amount so authorized."

By statutory definition "municipality" as used in this section embraces school districts. G. S. 1913, § 1847.

By G. S. 1913, § 1968, it is provided: "The trustees or board of education of any school district in this state * * * are hereby authorized and fully empowered to issue the orders or bonds of their respective districts, with coupons, in such amounts and at such periods as they may be directed by a vote of a majority in favor thereof of the legal voters present and voting at any annual meeting, or at any special meeting, called for the purpose, of the district. * * *"

The board did not resolve that it was expedient to borrow money as it is contemplated by section 1855 that it may. It is the contention of the relators that when the bonds were voted it was the duty of the school authorities to issue them though there was no prior resolution of expediency. It is the contention of the respondents that the statute contemplates prior affirmative action by resolution.

Section 1855 is R. L. 1905, § 784. Prior to the revision the substance of it was a part of the statute law but referred to villages. See G. S. 1894, § 1233, and prior statutes there cited. By the revision of 1905 it was carried into the chapter on public indebtedness and made applica-

ble to school districts. Prior to the revision the statute law now embodied in section 1855 did not apply to school districts.

Section 1968 is Laws 1905, p. 407, c. 272, and is in terms an amendment of G. S. 1894, § 3688, which is traced through G. S. 1878, c. 36, § 26, and had its origin in Laws 1877, p. 124, c. 74, subc. 2, § 8. It always referred to schools. G. S. 1894, § 3688, and the prior statutes which it embodies, were repealed by the revision of 1905 which became effective March 1, 1906. G. S. 1913, §§ 9440, 9443, 9446, 9447. Laws 1905, p. 407, c. 272, was approved April 18, 1905, and by force of G. S. 1913, § 9398, is, if it differs from the revision, to be construed as amendatory and supplementary.

We are required to construe sections 1855 and 1968 so far as they bear upon the facts presented. A discussion or citation of cases will not be useful. None are directly in point or very helpful. The question of the proper construction is not free of difficulty. The purpose is to declare the legislative intent. A majority are of the opinion that the bonding must be initiated by the board; that a resolution such as is provided by section 1855 must be passed; that without such resolution the board is not authorized to issue bonds though there has been an election on the question, called pursuant to G. S. 1913, § 2911, and an affirmative vote in favor thereof; that neither section 1855 nor 1968 contemplates a vote upon the issuance of bonds without such resolution; that without a prior resolution a vote at a school meeting is ineffective; that section 1968 is in the nature of an authorization to the board to issue bonds after a resolution of expediency followed by an affirmative vote of the legal voters at a school meeting; and that it is not contemplated that the voters at a school meeting may take the initiative and require the board to issue bonds concerning which it has not passed the resolution for which provision is made in section 1855.

The board did not pass the resolution. The vote at the school meeting was without effect. The board was not authorized to issue the proposed bonds and the writ was rightly quashed.

Order affirmed.

FRED A. JONES v. THOMAS FLAHERTY.1

December 28, 1917.

No. 20.642.

Malicious prosecution - malice - want of probable cause.

1. In an action for malicious prosecution plaintiff must prove malice, and want of probable cause for the prosecution.

Same — what is evidence of probable cause.

2. If he makes a full and fair statement to a competent lawyer and is advised by the lawyer, upon such statement, that prosecution will lie, this is proof of probable cause.

Same.

3. If the statement made is not full and fair, this defense collapses.

Same - verdict sustained by evidence.

4 In this case the verdict of the jury is, in effect, a finding that defendant did not make such full and fair statement. The evidence sustains such a finding.

Damages excessive.

5. The damages are excessive and a new trial should be granted, unless plaintiff consents to a reduction of the verdict.

Action in the district court for Ramsey county to recover \$10,000 for malicious prosecution. The answer alleged that plaintiff, believing his property had been destroyed and removed, stated the facts to the city prosecutor, who advised defendant to bring action and filed a complaint in the municipal court of St. Paul; plaintiff was thereafter arrested and, after hearing in the municipal court, discharged. The case was tried before Converse, J., who at the close of the testimony denied defendant's motion to dismiss the action, and a jury which returned a verdict for \$1,125. Defendant's motion for judgment notwithstanding the verdict was denied and his motion for a new trial was granted, unless plaintiff consented to a reduction of the verdict to \$600. From the order denying this motion, defendant appealed. Affirmed.

R. A. Walsh, for appellant.

Edgerton & Dohs, for respondent.

¹Reported in 165 N. W. 968.

139 M.--7

HALLAM, J.

Action for malicious prosecution. Defendant owned a dwelling house in St. Paul. Plaintiff occupied it as tenant. Defendant terminated the tenancy and plaintiff moved. Next day defendant claimed to have found that certain damage had been done to the interior of the house. He thought of having plaintiff arrested. He went to his lawyer who referred him to the city prosecutor. His statement to the city prosecutor and the advice given is testified to by that official as follows:

"He said there were * * * some drawers in closets up stairs * * * that had been removed * * * and there was considerable shelving had also been removed from these closets. He mentioned a window on the second floor * * * that had been broken, and he described the damage to the window; he stated it looked as though it had been pushed out. He stated there were some curtains or window shades that had been removed from the down stairs * * * I believe, and that one or two of those curtains had been cut; he described the cut to me * * *. And I think he said something about wall paper being torn in the hallway. also mentioned a trap or water faucet being destroyed or removed—in the kitchen I believe; and said that the vegetable bin and coal bin and either a table or bench in the cellar had been removed; and that there were evidences that they had been destroyed or cut up down there; and he had with him at the time several shavings or pieces of wood he contended were parts of these bins or benches. * * * He claimed also this property he described was in good condition when Mr. Jones moved into the place, and was found in this condition or was missing entirely when the defendant moved out. I told him he had probable cause to believe that Mr. Jones had caused this damage * * * that he had probable cause to have a warrant issued for his arrest on that charge."

The prosecutor then prepared a complaint on a charge of malicious destruction of property, had defendant sign it and caused a warrant to issue. Plaintiff was arrested, tried and acquitted, and then brought this action. This case has been tried twice. Two juries found for plaintiff. The last jury gave a verdict for \$1,125. Defendant appealed.

1. Plaintiff was obliged to prove malice of defendant and want of probable cause for the prosecution. There was evidence from which a jury might find malice. The only question is whether there was sufficient

proof of want of probable cause. On this point the law is that, before instituting a prosecution, a party is not bound to have evidence that will insure a conviction. He is not required to be absolutely convinced, but he must have evidence sufficient to justify an honest belief of the guilt of the accused. What is necessary is, that there should be such circumstances as would warrant a reasonable man, discreet man, a prudent man, in believing the accused guilty. Stewart v. Sonneborn, 98 U. S. 187, 25 L. ed. 116.

- 2. He is not obliged to trust to his own judgment. It is not always wise that he should do so. It is better that he should consult a competent lawyer. If he does so, he should make a full and fair statement of all facts known to him, and all facts of which, with reasonable diligence, he may obtain knowledge. Indianapolis Traction & T. Co. v. Henby, 178 Ind. 239, 97 N. E. 313; Smith v. Fields, 139 Ky. 60, 129 S. W. 325, 30 L.R.A.(N.S.) 870; Pawlowski v. Jenks, 115 Mich. 275, 73 N. W. 238; Wakely v. Johnson, 115 Mich. 285, 73 N. W. 238; Ambs v. Atchison, T. & S. F. Rv. Co. (C. C.) 114 Fed. 317; Blunk v. Atchison, T. & S. F. Ry. Co. (C. C.) 38 Fed. 311, 26 Cyc. 35. If, after such statement he is advised by the lawyer that prosecution will lie and he acts in good faith upon that advice, this is conclusive proof of probable cause and establishes a complete defense to the action for malicious prosecution. This rule applies with still greater reason when the lawyer, upon whose advice he relies, is a public prosecutor, Moore v. Northern Pac. R. Co. 37 Minn. 147, 33 N. W. 334. See Shea v. Cloquet Lumber Co. 92 Minn. 348, 100 N. W. 111, 1 Ann. Cas. 930.
- 3. There was sufficient evidence of want of probable cause if we eliminate the advice given by the city prosecutor. The statement made to the city prosecutor is undisputed. That the city prosecutor, upon that statement of fact, advised the prosecution, is undisputed. The only question is, did defendant make to him a full and fair statement of the facts. If he did, his defense is complete. If he did not, his defense collapses. Norrell v. Vogel, 39 Minn. 107, 38 N. W. 705.
- 4. The verdict of the jury amounts to a finding that he did not make a full and fair statement to the city prosecutor. There is evidence that defendant's statement as to the condition of the premises was much exaggerated, that some of the conditions that did exist, existed before

plaintiff became a tenant of the premises, and that others were not caused by plaintiff, and that defendant knew or could easily have ascertained this. In fact, if the testimony for plaintiff is all true, there was little or no damage which plaintiff did or could have done. We are of the opinion that the evidence is such as to sustain a finding that defendant did not make a full and fair statement to the prosecutor, and that there is sufficient proof of want of probable cause for the prosecution.

5. Defendant claims the damages are excessive. We think they are. Plaintiff was arrested about 8 o'clock in the morning and taken to the municipal court and there locked up with other prisoners awaiting the call of his case. His case was called at about 10 o'clock and was continued. He was then again held at the court house until 11:30 when he was taken to the county jail, searched, measured and held until some time after noon, when he was released on bail. He was required later to attend the trial, but was not thereafter imprisoned or restrained of his liberty. The amount of money out of pocket was small. The principal elements of damage were for the indignity plaintiff suffered and for punishment of the defendant. The facts warrant substantial damage, but we think the amount allowed cannot be sustained. The verdict may stand if plaintiff shall within 10 days after filing a remittitur in the district court consent to a reduction to \$600. Otherwise a new trial must be had. So ordered.

JOHN W. LINDSTROM v. H. H. HELK.1

December 28, 1917.

No. 20,658.

Specific performance — contract of sale — assumption of mortgage — offer of proof.

1. The plaintiff contracted to sell to the defendant and the defendant agreed to purchase real property for a consideration of \$10,000, and as a part of the consideration agreed to assume a mortgage of \$5,200 re1Reported in 165 N. W. 873.



cited as then being on the property. There was then upon the property a mortgage of \$5,500 and it was the only mortgage. Conceding that the plaintiff under a proper allegation might show his ability to reduce the mortgage to \$5,200 and give good title at the time of the decree subject to a mortgage indebtedness of \$5,200, and upon a proper offer of proof or tender might have specific performance, he was not entitled to relief in the absence of an affirmative showing.

Trial -- findings of the court.

2. The record is held to show that the parties submitted the case for decision; and this being so it was proper to make findings on the merits.

Action in the district court for Hennepin county to recover \$1,375 upon a contract. The case was tried before Fish, J., who made findings and ordered judgment in favor of defendant. From an order denying his motion for a new trial, plaintiff appealed. Affirmed.

William T. McMurran and O'Malley & O'Malley, for appellant. Laybourn & Cary, for respondent.

DIBBLL, C.

This action was commenced as one at law to recover sums due on an earnest money contract for the sale of real property. It was tried as an action in equity for specific performance. It resulted in findings for the defendant. The plaintiff appeals from the order denying his motion for a new trial.

1. The facts admitted by the pleadings are substantially these: On August 15, 1916, the plaintiff as vendor and the defendant as vendee entered into an earnest money contract for the sale and purchase of property in Minneapolis. The consideration was \$10,000 of which \$200 was paid in cash. The portion remaining was to be paid, using the language of the contract, as follows: "Thirteen hundred dollars (\$1,300.00) when title is shown in seller and contract for deed furnished. Purchaser to assume and pay the mortgage of fifty-two hundred dollars now on said premises and to pay the balance of thirty-three hundred dollars in monthly payments of seventy-five dollars per month, beginning with Sept. 15, 1916, with interest at six per cent per annum." The mortgage then on the property was for \$5,500 instead of \$5,200.

For the purposes of this appeal we assume that if the plaintiff reduced the mortgage to \$5,200 so that the defendant would not be required to pay a greater mortgage indebtedness than he had agreed to pay, specific performance might be enforced. In the reply, but not in the complaint, it was alleged that the plaintiff was ready, able and willing to pay \$300 on the mortgage and thereby reduce it to \$5,200, and "that upon the completion of the performance of said contract by the defendant, plaintiff stands ready, willing and able to convey title to said defendant, free and clear of all incumbrances, save and except a mortgage of five thousand two hundred (\$5,200.00) dollars. There was no proof of this nor offer of proof. It was a part of the plaintiff's case. The necessity of the mortgagee assenting to a reduction was at one time suggested by the court. We do not understand that the plaintiff was at the time of the trial in position to tender title to the defendant, subject only to a mortgage encumbrance of \$5,200. He did not offer to do so nor did he offer to prove that he was in position to do so then or at a definite time in the future. With the record so and with a construction of the pleadings favorable to the plaintiff, there could not have been a finding in his favor, and he was not entitled to specific performance.

2. The findings were for the defendant on the merits. The troublesome question is whether there should have been findings on the merits
or only a dismissal. Bad practice and a defective record are responsible
for it.

The plaintiff was called as a witness and a few formal questions were asked. The defendant objected to the introduction of testimony upon the ground that the complaint did not state a cause of action. The court, relying upon Freeman v. Paulson, 107 Minn. 64, 119 N. W. 651, 131 Am. Rep. 438, held that an action at law to recover instalments accruing on the contract would not lie. The jury was discharged with the consent of both parties. The action proceeded without repleading as one for the specific performance of the earnest money contract. The effect of the mortgage being for \$5,500 instead of \$5,200 was discussed. At this time no ruling had been made upon the objection to the introduction of testimony. The findings of the court recite that the objection was held well taken. The settled case shows no ruling. It can be gathered from the record that the court was of the opinion that

no cause of action was stated in the complaint, unaided by the reply, and that none was proved, and this was correct. From the findings it appears that it was of the opinion that the defendant could not be required to take title though the mortgage indebtedness was reduced to \$5,200. Finally, and it must have been after the occurrence of something which the record does not disclose, the defendant withdrew his counterclaim which was for the \$200 earnest money paid. The court then inquired whether he moved for a dismissal. Instead he moved that findings be made on the merits. The court indicated that it would dispose of the case on such motion and direct findings for the defendant. Subsequently, findings were made and the facts admitted by the pleadings were found. If what was done amounted to a submission of the case by the parties, findings on the merits were justified; otherwise there could have been no more than a dismissal. The plaintiff did not ask to dismiss, nor make any offer of proof, nor indicate a desire to proceed further, nor did he object to the making of findings. What he did should be held the equivalent of resting his case. Clearly what the defendant did when he withdrew his counterclaim and asked for findings. though irregular, was the equivalent of resting. We hold that there was a submission of the case. This being so it was proper to make findings on the merits; and they could not have been otherwise than for the defendant.

Order affirmed.

W. G. JORDAN v. C. E. VAN DUZEE.1

December 28, 1917.

No. 20,671.

Sale - implied warranty of title.

1. There is an implied warranty of title applicable, in the absence of an express warranty, to all sales of personal property by the person in possession who assumes the right to sell it as his own.

1Reported in 165 N. W. 877.

Same — waiver of breach of warranty.

2. There is no waiver of a breach of such a warranty where the vendee, without coercion by judicial process, on demand surrenders the property to the holder of a title superior and paramount to that of his vendor.

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Same - adverse title - burden of proof on vendee.

3. The vendee may in such case determine the validity of an outstanding fitle in his own way, but has the burden of establishing the same when necessary to support an action against his vendor for a breach of the warranty of title.

Contract — description of property sold — verdict sustained by evidence.

4. The evidence held to justify a finding by the jury that an adding machine was included within the general description of the property transferred by the contract involved in this action.

Pleading -- evidence.

5. The complaint states a cause of action and the evidence justifies the verdict.

Action in the municipal court of Minneapolis to recover \$325, the value of a Burroughs adding machine. The answer denied specifically that defendant ever owned or sold plaintiff a Burroughs adding machine or that any adding machine was part of the property of the Superior Electric Manufacturing Company; alleged that if the adding machine had been any part of the property of said Superior Electric Manufacturing Company at said time, it was duly reserved under the terms of the agreement of December 28, 1914, and was never sold to plaintiff at any time, and alleged that if plaintiff delivered any adding machine to the Burroughs Adding Machine Company it was so done voluntarily, and not as alleged in the complaint. The case was tried before Charles L. Smith, J., who denied defendant's motions for a directed verdict, and a jury which returned a verdict for \$300. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Trafford N. Jayne, for appellant.

J. H. Morse, for respondent.

Brown, C. J.

The facts in this case briefly stated are as follows: By a contract between the parties of date December 28, 1914, defendant, who was engaged in business under the name of Superior Electric Manufacturing Company, sold and delivered to plaintiff certain personal property, then being upon and within the premises and place of business of the company, and described in the written contract of sale substantially in the following language:

All the business and good will of said Superior Electric Manufacturing Company, including all machinery, furniture, fixtures, material and equipment of said company, except certain furniture and a typewriter and desk in that part of the premises occupied by defendant as a private office, and certain specified stock and material, and also certain dies and printing material belonging to the Bing Manufacturing Company.

At the time the contract was entered into, and when the premises and property were turned over and delivered to plaintiff, there was among the various items of property forming the equipment of the company an adding machine of the alleged value of \$325. This machine was subsequently claimed by the Burroughs Adding Machine Company, the manufacturer thereof, and after due inquiry into the merits of the claim plaintiff surrendered the machine upon its demand therefor. Plaintiff thereafter brought this action to recover the value of the machine, as for the alleged breach of defendant's warranty of title. He had a verdict in the court below, and defendant appealed from an order denying his alternative motion for judgment or a new trial.

It is contended by defendant: (1) That the complaint does not state facts sufficient to constitute a cause of action; (2) that the evidence does not justify a finding that the adding machine was included in the sale to plaintiff of the electric company equipment; (3) if the evidence be held sufficient to justify such a finding, then that plaintiff waived any right to complain of the failure of title by voluntarily surrendering the machine to the Burroughs Company; and (4) that the court erred in not granting a new trial on the ground of newly discovered evidence.

1. We discover no substantial objection to the complaint. Properly construed it alleges the sale and delivery to plaintiff of the property and equipment of the electric company, with a warranty of title; that the

adding machine was included in and was a part of the property so sold, though it was not in fact the property of defendant, but belonged to the Burroughs Company; that upon demand by that company plaintiff surrendered the possession of the machine, to his damage in the sum of \$325, the alleged value thereof. The facts so pleaded clearly show a right of action for the breach of defendant's warranty of title to the machine. The action is in contract, not in tort, and allegations of fraud and deceit are unnecessary. And though the complaint contains no allegations showing an express warranty of title, by representations to that effect, the case as made by the allegations stated, as well as by the evidence given at the trial, is controlled by the rule of implied warranty applicable, in the absence of an express warranty, to all sales made by the person in possession of personal property, who assumes the right to and does sell it as his own. Davis v. Smith, 7 Minn. 328 (414); Close v. Crossland, 47 Minn. 500, 50 N. W. 694; Northern Pacific Rv. Co. v. Holmes, 88 Minn. 389, 93 N. W. 606; Williston, Sales, § 218. We therefore pass the objections to the complaint as not of substantial merit.

2. There may be some doubt whether defendant intended to include the adding machine in the sale, but our examination of the record leads to the conclusion that the solution of that doubt was an issue for the jury and the trial court. It is clear that the machine was upon the premises of the electric company at the time of the sale, and apparently a part of the equipment in use by that company. The evidence does not show that defendant pointed it out as a part of the property to be transferred; nor does it appear that any other of the various articles were so pointed out. The sale was in bulk and no inventory thereof was taken. But the evidence does show that plaintiff was aware of the presence of the machine and it was taken into account by him in estimating the value of the property, taken as a whole. The description of the property sold is broad enough to include the machine, and the fact that defendant did not own it is important only as it may bear upon his intentions in the transaction. Presumptively he intended to include the machine, for it was present as a part of the property sold, and was not expressly excluded as were other articles of property not belonging to him. Plaintiff purchased with knowledge of the presence

of the machine among other items of equipment, at least the jury were justified in so finding, in view of which defendant is in no position to urge that he did not in fact intend to sell it.

The further point in this connection, that the machine was in the defendant's private office, therefore within one of the exceptions stated, was for the consideration of the jury. The evidence thereon is not such as to justify interference by this court.

3. The contention that there was a voluntary surrender of the machine by plaintiff, hence a waiver of the breach of the warranty of title, is not sustained. There was in fact an outstanding paramount title in the Burroughs Company. This is conceded by defendant. That company asserted its title and demanded possession, and to avoid a lawsuit, as plaintiff testified, he delivered the machine over to such owner. action was brought against plaintiff, though the Burroughs Company did bring suit therefor against defendant. But, with the outstanding paramount title facing him, plaintiff was not required to await the appearance of judicial process to gain possession of the machine. had the right under the rules of law applicable to the situation to determine for himself the merits of the outstanding claim, at his peril, of course, and act thereon. The only effect of pursuing that course in a case of this kind is that in an action against the vendor for a breach of the covenant of title the vendee must assume the burden of establishing by clear evidence the validity of the adverse claim. This burden can be avoided by refusing a surrender to the claimant, thus putting him to an action to recover the property. In such case the vendor may be notified of the suit and requested to defend the same, and, if he refuses, the judgment therein will be conclusive against him in a subsequent action by the vendee. But he waives no rights against the vendor by surrendering the property on demand to the holder of the superior title.

This is well settled as the prevailing rule in this country. 15 Am. & Eng. Enc. (2d ed.) 1252; Williston, Sales, § 221; 2 Mechem, Sales, § 1796; Johnson v. Oehmig & Wiehl, 95 Ala. 189, 10 South. 430, 36 Am. St. 204; Bordwell v. Collie, 45 N. Y. 494; McGiffin v. Baird, 62 N. Y. 329; Hodges v. Wilkinson, 111 N. C. 56, 15 S. E. 941, 17 L.R.A. 545; Clevenger v. Lewis, 16 Ann. Cas. note page 64; Matheny v. Mason,

73 Mo. 677, 682, 39 Am. Rep. 541. The case of Close v. Crossland, 47 Minn. 500, 50 N. W. 694, does not hold to the contrary. All that is said in that case is that there must be a surrender to a compulsory demand by the true owner. There is such compulsory demand within the meaning of the law when the true owner presents his claim and establishes his paramount title. Cahill v. Smith, 101 N. Y. 355, 4 N. E. 739.

4. The newly discovered evidence made the basis of defendant's motion for a new trial is cumulative, if not wholly impeaching in character, and not of such probative force as to justify us in holding that the trial court abused its discretion in denying the motion. 2 Dunnell, Minn. Dig. §§ 7123, 7129. The charge of the court, of which complaint is made, presents no reason for a new trial. The record discloses evidence which supports the instructions, and there was therefore no error in submitting the particular phase of the case to the jury. Whether the testimony gave out the truth was for the jury to determine.

Order affirmed.

HUTTIG MANUFACTURING COMPANY v. NATIONAL CONTRACTING COMPANY.

December 28, 1917.

No. 20,675.

Contract - construction of offer - breach - damages.

The trial court correctly instructed the jury that under the accepted proposal described in the opinion, and certain correspondence which followed, a contract was made between plaintiff and defendant, that it was admitted that the contract was broken by plaintiff, and that the only question for the jury was the extent of the damages sustained by defendant from the breach.

Action in the district court for Douglas county to recover a balance of \$175. Defendant set up a counterclaim for \$677.32. The facts are stated in the opinion. The case was tried before Roeser, J., and a jury

1Reported in 165 N. W. 879.

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which returned a verdict in favor of defendant for \$716.50. From an order denying its motion for a new trial, plaintiff appealed. Affirmed.

Ralph S. Thornton, for appellant.

Constant Larson, for respondent.

BUNN, J.

In October, 1915, defendant entered into a contract with the proper, authorities for the construction of a public school building at Glenwood, Minnesota. October 14, plaintiff wrote to defendant as follows:

We will furnish the mill work, subject to a mutually satisfactory contract, for the school building at Glenwood, Minn., by Alban & Lockhart, architects, all as per plans and specifications, glazed, including birch trim as per alternate.

The above for the sum of four thousand one hundred and eighty-two (\$4,182.00) dollars f. o. b. cars Muscatine, Iowa, with freight allowed to Glenwood.

The Huttig Mfg. Co. Per F. I. Taylor.

This proposal was accepted by defendant in writing at the foot of the letter.

Plaintiff furnished mill work under this contract to the invoice value of \$725, when it refused to further perform its contract. This action was brought to recover a balance of \$175 alleged to be due for the mill work delivered. The answer admitted the balance due plaintiff on this account, but claimed damages from plaintiff on account of its refusal to furnish the rest of the mill work as agreed. The jury found a verdict in favor of defendant, assessing its damages at the sum of \$716.50. Plaintiff appeals from an order denying its motion for a new trial.

The assignments of error all go to the same point, the court's instruction to the jury that under the accepted bid and certain correspondence that followed a contract was made between plaintiff and defendant, that it was admitted that the contract was broken by plaintiff, and that the only thing left for the jury was to determine how much damage the defendant had suffered on account of the breach. Plaintiff's only criticism of this instruction is that it told the jury that plaintiff and defendant

entered into a contract for the mill work. The contention is that the words "subject to a mutually satisfactory contract" in the proposal made the contract conditional upon the execution of a further "mutually satisfactory contract."

We are not sure what the quoted words mean in the connection in which they are used, but it is clear enough that the accepted proposal was a complete contract in itself, and it was so construed by plaintiff in a letter written by it to defendant the next day, in which letter plaintiff acknowledged receipt of "signed contract given our Mr. Taylor for furnishing material for the Glenwood School," thanks defendant for the business, and promises to ship some of the material in a very short time. This, and the actual furnishing of part of the mill work without any suggestion that the contract was not complete and final, and other conduct of plaintiff, leaves no room for doubt that the accepted proposal was a complete, final and binding contract. As it was admitted that plaintiff breached this contract, the court was clearly right in saying to the jury that all that was left for them was to determine defendant's damages. No claim is made as to the sufficiency of the evidence as to these damages.

There is a claim of newly discovered evidence, but no assignment of error raises the question, and it is not before us.

Order affirmed.

PRICY FULLER v. LUDWIG JOHNSON AND OTHERS.1

December 28, 1917.

No. 20,696.

Estoppel — wife cannot question husband's conveyance — evidence.

In 1909 plaintiff's husband executed and delivered to defendants a warranty deed of land owned by him. The deed appeared on its face to have been executed and acknowledged by plaintiff, but in fact she did not execute or acknowledge it. In this action brought in 1915, in which plaintiff claims an undivided one-third interest in the land, her

¹Reported in 165 N. W. 874.

husband having died in 1910, it is held, that the findings to the effect that plaintiff had full knowledge of the transaction immediately after it occurred, acquiesced therein, accepted and retained the benefits thereof, are sustained by the evidence, and warrant the conclusion that plaintiff is equitably estopped from maintaining the action.

Action in the district court for Meeker county for partition and to recover \$500, the value of the use of plaintiff's interest in the land during the time she was excluded therefrom. The answer alleged that on December 16, 1909, George Fuller and his wife sold the land to defendants Johnson for \$5,000; that thereafter a controversy arose between husband and wife as to the division of the consideration, and after his death, plaintiff, acting as administratrix of his estate, drew the consideration from the bank on April 1, 1911, and ever since has retained the money. The case was tried before Daly, J., who found that plaintiff by her acts was estopped from maintaining the action. From an order denying her motion for a new trial, plaintiff appealed. Affirmed.

Raymond H. Dart, for appellant.

N. D. & C. H. March, for respondent.

Bunn, J.

In 1904, and for many years before, plaintiff was the wife of George Fuller. He owned an 80-acre tract of land in Meeker county. Prior to 1904, plaintiff and her husband lived in that county. In that year, while they were in the state of Virginia, plaintiff gave to her husband a power of attorney by the terms of which he was empowered to deed and convey "all my lands that I have, or any interest, in the county of Meeker and state of Minnesota." In December, 1909, while the parties were living in the state of Washington, plaintiff's husband executed and delivered to defendant a warranty deed of the Meeker county land. This deed purported to be executed and acknowledged by George Fuller and the plaintiff, his wife. But as a matter of fact plaintiff never executed the deed or acknowledged it. Her husband signed her name, took the deed and the power of attorney before mentioned to a notary public, who was persuaded to and did sign the acknowledgment as though plaintiff had appeared personally before him, retaining the power of attorney as evidence of his authority. The consideration for the deed was \$5,000, and

was paid to George Fuller, \$1,000 in cash, and the balance in four certificates of deposit for \$1,000 each, issued in Fuller's name by a bank at Dassel, Minnesota. The cash, except \$50 paid to plaintiff for household expenses, was put by Fuller into his business in Washington. The certificates of deposit were kept in the home of the parties. George Fuller died October 10, 1910. This action was commenced in the fall of 1915. It is a partition action, plaintiff claims to own an undivided one-third interest in the Meeker county land, and is seeking a partition or sale, and a money judgment for the value of the use of her one-third interest during the time she has been excluded therefrom. The case was tried and a decision rendered in favor of defendants, the court holding that the deed was void as a conveyance of plaintiff's inchoate interest in the land, but that plaintiff was estopped by her acts from maintaining the action. Plaintiff appeals from an order denying her motion for a new trial. The same order denied her motion to amend the findings and conclusions.

The assignments of error attack most of the trial court's findings, its refusal to find as requested, and the conclusion of law that plaintiff is estopped and therefore not entitled to prevail in the action.

We find it unnecessary to discuss the various assignments of error relating to the findings. We will say that the material findings are amply sustained by the evidence, and that we find no error in the refusal to make any of the amendments requested by plaintiff. The question in the case is whether the facts justify the conclusion that plaintiff is estopped. The facts are very little in conflict, and may be stated as follows:

Plaintiff learned of the deed to defendants and of their payment of the consideration to her husband immediately after the transaction. There is in addition evidence tending to show that the matter of selling the Meeker county land had been before this discussed by plaintiff and her husband, and that she expressed her assent, coupled with the condition that she should have part of the proceeds. She wrote to defendant Ludwig Johnson on learning of the transaction. This letter had been lost; plaintiff testified that it was simply a notice to defendant that she did not sign the deed; Ludwig Johnson testified that plaintiff wrote in the letter that she never signed the deed, but would be satisfied if she got her money. There is evidence that she wrote also to the banker in Dassel

who had conducted the transaction, demanding that he remit to her her share of the money received for the land. There was no answer to these letters. Defendants went into possession of the land immediately and have been in possession ever since. The deed was absolutely regular on its face, and defendants had no knowledge that plaintiff did not sign it until her letter was received.

As before stated George Fuller died October 10, 1910. He left a will, but his widow renounced its provisions, electing to take what the laws of Washington gave her, one-half of the estate. She was appointed administratrix of her husband's estate in February, 1911. As administratrix she took possession of the certificates of deposit, and in April, 1911, collected them, with \$200 interest. She accounted for this \$4,200 to the estate. After the estate was administered, the final decree of the Washington court having charge of the estate assigned one-half of the residue of the real estate and personal property to plaintiff as the widow of deceased, and one-half as provided in the will. Plaintiff received under this decree an undivided half interest in real estate in Washington; as to the personal property, there was little left after the payment of debts, the monthly allowances made plaintiff during administration, and the payment for services as administratrix. The trial court found as a fact that of the purchase price of the Meeker county land plaintiff received for her own use and benefit and with full knowledge of all the facts, the sum of \$2,150, and still retains the same; that of this sum \$50 was received by her at the time of sale, and \$2,100 as the heir of her husband. This finding is attacked as not supported by the evidence, and counsel for plaintiff practically concedes that, if this finding is sustained, plaintiff's case fails.

We think the evidence sustains this finding. It is true that the \$4,200 received from the certificates of deposit was practically all used to pay claims against the estate and the allowances to the widow, but plaintiff received the benefit of half that sum, in that her half interest in the real estate was relieved from the payment of debts of the deceased, the allowances to his widow and expenses of administration. Of course the power of attorney (which, by the way, plaintiff revoked after the deed was executed) gave Fuller no right to convey his wife's inchoate interest in the land. But it tends to strengthen the evidence that plaintiff had agreed

that the Meeker county land should be sold, and that her only concern was that she should receive some part of the money. It seems clear from the evidence that she acquiesced in the transaction. She never protested after her letters to defendant and the banker, and at no time did she make any claim that the deed did not convey her interest. manded money, and appears to have been satisfied with what she got out of her husband's estate, until some four years later when this action was brought. We have a case of acquiescence with full knowledge of all the facts, and long silence, leading defendants to believe that she made no claim. We do not say that mere acquiescence, or silence, or even the long delay, would constitute an estoppel by conduct, or equitable estoppel. But we have here another very important element, that is, the acceptance and retention by plaintiff of the benefits of the transaction. It is not so much an estoppel by election between two inconsistent remedies, as it is an estoppel created by the conduct of plaintiff, considered as a whole, for the many years after she had knowledge of the facts. It would be unjust to defendants now to deprive them of one-third of the land, after in good faith paying for all of it, and after the value has increased, and valuable improvements made.

The principles governing the doctrine of equitable estoppel are so well stated in Dimond v. Manheim, 61 Minn. 178, 63 N. W. 495, and in other cases in this state, that a statement of them here would be useless repetition. That by receiving and retaining the benefits of a transaction, with full knowledge of the facts when the party may accept or reject without serious inconvenience, an estoppel is created, is well settled law. Pederson v. Christofferson, 97 Minn. 491, 106 N. W. 958. See Orr v. Sutton, 127 Minn. 37, at page 59, 148 N. W. 1066, Ann. Cas. 1916C, 527, and authorities cited. Plaintiff was not obliged to take the money; she could have accepted or rejected without serious inconvenience. As before stated, the evidence indicates quite clearly that she took the money not because she was compelled to, but because that was what she wanted.

We are of the opinion that the evidence sustains the findings of the trial court, and its conclusion that plaintiff should have no relief in this action. We discover no error.

Affirmed.

WILLIAM STOERING v. NELS SWANSON AND OTHERS.1

December 28, 1917.

No. 20,702.

Common ditch — owners estopped against closing it — case followed.

1. Where landowners, to drain or improve their several holdings, pursuant to a mutual understanding unite in constructing a drainage ditch, each of the owners is thereafter estopped from closing the ditch whereby the others are deprived of the drainage provided. This rule, announced in Munsch v. Stelter, 109 Minn. 403, controls the decision herein.

Same — duration of estoppel.

2. The estoppel came into being as soon as the ditch was so established. And it, was not thereafter lost by a failure to assert dominion over the ditch upon the land of the other interested parties so long as they did not create an obstruction to the flow of the water therein.

Finding sustained by evidence.

3. The determinative finding, as to the original construction of the ditch by the united efforts of the several landowners interested, is definite enough to support the decision.

Same.

4. The evidence sustains the finding that plaintiff placed a dam or obstruction in the ditch which diminished the capacity it originally had for drainage.

Immaterial finding disregarded.

5. A finding which has no bearing on the conclusions of law may be disregarded.

Appeal and error — omission of nominal damages from judgment.

6. On appeal from a judgment an appellant cannot complain of nominal damages found against him which are not included in the judgment.

Same — objection not open to appellant.

7. Plaintiff cannot raise the objection that the waters from defendants' lands reach the county ditch for the establishment of which such lands have not been assessed.

¹Reported in 165 N. W. 875.

Action in the district court for Meeker county to restrain defendants from constructing certain ditches and turning surface water into plaintiff's private ditch. The facts are stated in the opinion. The case was tried before Daly, J., who made findings and granted a peremptory injunction commanding plaintiff to remove the barrier or dam placed by him in the ditch and to clean and deepen the ditch to the dimensions stated in the first paragraph of the opinion, and ordered judgment for \$5 damages. Plaintiff's motion for amended findings was granted in part and denied in part. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Affirmed.

Alva R. Hunt, for appellant. Raymond H. Dart, for respondents.

Holt, J. .

Plaintiff, the owner of 160 acres of land on the west boundary of Meeker county, brought this action to enjoin defendants, part owners of the marsh or low ground in Kandiyohi county which extends over and across plaintiff's premises, from ditching in the marsh and thereby discharging their surface water upon his land. The defendants answered that many years ago, by mutual agreement between plaintiff's grantor and defendants and their grantors and by their joint effort and costs, a ditch was dug northerly through said marsh in Kandiyohi county, thence easterly across the land of one of the defendants to the county line, and thence easterly over plaintiff's land emptying into a slough at a lower level on the easterly part of his land which drained to the north into Crow river; that said ditch so established continued to drain and carry off the surplus waters on said lands of defendants and plaintiff until plaintiff wrongfully began to fill in the same at a point where it crosses the west line of his premises. Relief was asked against the obstructions placed in the ditch by plaintiff. The decision was in favor of defendants, directing plaintiff to remove the dam or obstructions placed by him in the ditch, so that the bottom thereof where it enters his premises will be 10 inches below the surface level and its width 24 inches. Plaintiff appeals from the judgment entered upon the findings and order for judgment.

It is entirely clear upon this record that plaintiff was not entitled to injunctive relief. The defendants had merely completed the cleaning out by a ditching plow, upon their own lands, the old plow ditch hereinafter mentioned. So long as they refrained from disturbing the condition of the ditch upon plaintiff's land, there would be no tendency to cast more water thereon than came there before. Especially would that be true if plaintiff's contention were right that the natural drainage of defendants' land is to the west and north. The marsh on the westerly part of plaintiff's quarter section is a part of the same marsh of which defendants own a portion, and is practically level. Hence there could not well be a collecting of waters and discharging of the same upon plaintiff's land by means of ditches, unless the ditch on his land was also cleaned out or deepened. But we do not understand the learned attorney for appellant to claim that the evidence establishes any ground upon which his client may ask relief.

The following portions of the findings are supported by evidence and are not challenged by any assignment of error, viz.: "Second. That all of the defendants' said land is low, flat, level, marshy land, a part of a flat, level marsh containing several hundred acres. That a portion of said low, level marshy land extends to the south line of section 13, a distance of a mile running thence north and varies in width from a few rods to more than half a mile. That a portion of said marshy land of which the said defendants' land forms a part, extends across the plaintiff's land in an easterly direction to a slough on said plaintiff's land, which slough is several feet lower than the level of the said marshy land. * *

"Third. That more than twenty-five years prior to the commencement of this action these defendants and their grantors and the plaintiff and his grantors, each paying his share therefor, jointly constructed and caused to be constructed what is known as a plow ditch beginning at the south line of section 13, thence running northerly thru the said marsh, and at a point in section 13 opposite the said neck of land which runs across plaintiff's said land a ditch was constructed running easterly through the said neck across the land of plaintiff and terminating in the slough on plaintiff's land heretofore mentioned, which said ditch confined the surface water within its banks and conducted it across plaintiff's land. That said ditch where the same crossed plaintiff's west line was

ten inches deep and twenty-four inches wide and so remained up to the time of the acts of plaintiff hereinafter mentioned."

In our opinion under these findings the case is ruled by Munsch v. Stelter, 109 Minn. 403, 124 N. W. 14, 25 L. R. A. (N. S.) 727, 134 Am. St. 785. Plaintiff's grantor and defendants or their grantors having pursuant to a mutual understanding and at a common expense established a drainage system to benefit or improve the several tracts of land belonging to them, plaintiff is now estopped from depriving defendants of the drainage given these lands. The right of the parties to invoke the doctrine of estoppel for protection against interference with the flow of water, came into being when the ditch was constructed under their mutual agreement and by their united efforts, or at their joint expense. It was not essential to a retention of the right so acquired that any one of the interested persons should at stated periods exercise dominion over the ditch upon the lands of the others. So long as the waters were suffered to flow unimpeded through the channel made, there was no denial of the right originally secured. The case cited makes it plain that the facts found bring the one at bar within a well recognized exception to the general rule announced in Johnson v. Skillman, 29 Minn. 95, 12 N. W. 149, 43 Am. Rep. 192, and other cases now relied on by appellant.

While the third finding, above set out, is not attacked as unsupported by evidence, it is challenged as not sufficiently definite upon which to predicate a decree. We think it is. The purpose of the ditch is apparent, viz., to perpetually carry off the surface water from the marshy ground of the parties who participated in establishing the same. It likewise appears how it was constructed, and presumably it was done in accordance with their mutual agreement. As so constructed it entered and passed over plaintiff's land, that is, the 50 feet here in question, in a channel 24 inches wide and 10 inches deep. We perceive no more indefiniteness in the findings here than in the ones in the Munsch case wherein, upon this proposition, arguments and authorities like the ones now presented and cited were very earnestly urged upon the attention of the court and were no doubt fully considered. This will appear upon comparing the findings and briefs in the two cases.

It is claimed that the evidence does not support the finding that plaintiff placed an obstruction or dam in the ditch. We cannot so hold.

Plaintiff admits that he dumped rocks in the channel, but says it was only to prevent the water from washing away or eroding the bottom of the ditch where it joins the part which he had dug considerably deeper than it originally was. No doubt plaintiff had the right to prevent the waters from digging the channel deeper than originally constructed. But we think the testimony shows that he did more. The engineer who testified for plaintiff and the one who was called by defendant state that the rocks came even with the level of the surface of the ground. This might not prevent a slight flow of water from finding its way around or between the stones, but when the ditch is filled there certainly would be an obstruction to the flow.

The fourth finding (in respect to ditches dug by plaintiff on his land near and parallel to the county line and embankments made therefrom) may be disregarded, for it does not control the conclusions of law in the slightest degree.

There was evidence that by the dam or obstruction the hay crop on defendants' lands was injured or destroyed. It does not appear what the value of this was in dollars and cents, but the court found what is denominated a nominal sum of five dollars as damages. The amount is immaterial in this appeal, for it is not included in the judgment.

That the waters from this old plow ditch discharge into a county ditch lately established under the drainage statute and that defendants' lands were not included in that proceeding can be of no consequence on this appeal, for the ditch as left by the judgment herein discharges no more water upon the area drained by the county ditch than had been so discharged for years previously, and if any objection could be made we think Meeker county and not plaintiff would be entitled to make it.

We discover no error or imperfection in the record which defeats the judgment.

Judgment affirmed.

STANDARD LITHOGRAPHING & PRINTING COMPANY v. TWIN CITY MOTOR SPEEDWAY COMPANY.1

January 4, 1918.

Nos. 20,605, 20,606.

Corporation - claim of creditor - objection to allowance.

1. The question, in proceedings against an insolvent corporation under G. S. 1913, § 6632, whether certain creditors are entitled to share in the distribution of funds derived from the statutory liability of stockholders, cannot properly be raised by an objection to the allowance of their claims, unless it affirmatively appears that the fund so to be raised is the only fund for distribution among the creditors, and for some valid reason the particular creditors are excluded from participating therein.

Same — distribution of fund among creditors.

2. When it does not so affirmatively appear the question may be raised on the receiver's application for an order of distribution.

Action in the district court for Ramsey county by a judgment creditor to sequestrate the assets of defendant corporation, to obtain the appointment of a receiver and to enforce the constitutional liability of stockholders. The receiver appointed by the court petitioned for an assessment upon the stockholders, and after hearing the court ordered an assessment of \$100 upon each share of stock. V. R. Irvin & Company filed a complaint in intervention for \$2,450 upon defendant's first mortgage bonds held by it. Robinson, Cary & Sands Company filed a complaint in intervention for \$1,040, with interest, upon defendant's first mortgage bonds owned by it. C. E. Dutton, a stockholder, filed answers to the complaints in intervention, objecting to the allowance of the claims on the ground that by the terms of the mortgage securing the bonds, the manner of enforcement was as stated in the fourth paragraph of the opinion. From orders, Haupt, J., allowing the respective claims of interveners, C. E. Dutton took separate appeals. Affirmed on both appeals.

Lancaster, Simpson & Purdy and L. E. Ineichen, for appellant.

Morphy, Bradford & Cummins and Lightner & Young, for respondents.

Reported in 165 N. W. 967.

Brown, C. J.

Proceedings under section 6632, G. S. 1913, for the appointment of a receiver of the Twin City Motor Speedway Company, an insolvent Minnesota corporation, to sequestrate its assets, enforce the constitutional liability of its stockholders, and for a distribution of the net proceeds among creditors of the company.

The cause comes to this court on an appeal taken by C. E. Dutton, a stockholder subject to the statutory liability, from the allowance of certain claims against the corporation.

In furtherance of the enterprise for which the corporation was formed and to provide necessary funds, the corporation issued its certain bonds in different denominations, securing the payment of the same by a mortgage upon specified property. There was default in the payment of the interest on the bonds as it accrued and the mortgage was foreclosed, the mortgaged property sold, and enough realized to pay the secured indebtedness to the extent of something over 60 per cent. The claims involved on this appeal represent the balance due claimants upon the mortgage bonds held by them and so in part paid from the proceeds of the foreclosure sale.

It is the contention of appellant that, under the terms and conditions of the mortgage securing the payment of the bonded indebtedness, the holders of the bonds in the collection thereof are expressly precluded from resorting to or participating in funds derived from the statutory liability of the stockholders; that the only fund likely to come to the receiver will be from such liability, and therefore that the court erred in allowing the claims here involved, for the fund so to be derived cannot be applied in payment thereof.

It may for present purposes be conceded that respondents are not entitled to share in the fund to be collected from the stockholders, and that the contract in this respect is valid. But it is clear that appellant is premature in raising the question. The record before us will not justify the conclusion that the stockholders' liability constitutes the sole present asset of the corporation. In fact it was conceded on the argument that the receiver now has the sum of about \$1,300 of other funds, and for aught that the record discloses further additions may be made thereto to which respondents may rightfully resort in payment of their claims. In view of

this situation it cannot be held that the court below erred in allowing the claims. A different conclusion no doubt could properly be reached in a case where it affirmatively appears that the only fund to be distributed will come from the statutory liability. It does not so appear in this case.

The question sought to be raised may be presented on the final accounting of the receiver or when he applies to the court for an order directing a distribution among the creditors of funds available for the purpose.

The other question suggested on the argument, namely, that respondents' sole remedy for the enforcement of the balance due on their bonds was a deficiency judgment in the foreclosure proceeding is not presented by the record. It does not appear whether the foreclosure was by action or by advertisement. The question was not presented to the lower court and no findings were made upon which it may be determined by this court.

Order affirmed.

ALOIS DRIMEL V. UNION POWER COMPANY AND ANOTHER.1

January 4, 1918.

No. 20.638.

Electricity - break in line - question of negligence for the jury.

1. The plaintiff's intestate, a child between 5 and 6 years old, was killed by coming in contact with a wire of a fence which had been electrified by a live wire of the defendant, on one of its transmission lines, which broke and fell upon it. The wire broke at 4:30 in the morning and the plaintiff's intestate was killed about 8:30. Assuming that the break was caused by lightning, and therefore that the defendant was not responsible for it, it was a question of fact for the jury whether the defendant, having notice at 4:30, by means of instruments in its plant provided for such purpose, of disturbances on its line, and of the probable breaking of two wires, was negligent in failing sooner to locate the break and prevent harm coming from it.

¹Reported in 165 N. W. 1058.

Same - charge to jury.

2. There was no error in not charging that the break was caused by lightning.

Same - request to charge.

3. The general charge embodied the substance of the one requested by the defendant as to when it received actual notice of the break and there was no error in its refusal.

Negligence of parents.

- The evidence did not show, as a matter of law, that the parents of the child, who are the sole beneficiaries of this action, were negligent.
 Damages not excessive.
 - 5. The verdict was for \$4,000 and was reduced by the trial court to \$3.400. It is held not excessive.

Action in the district court for Stearns county by the administrator of the estate of Giesela Drimel, deceased, to recover \$7,500 for the death of his intestate. The answer among other matters alleged that an accident occurred to defendants' electric line, which was caused by a bolt of lightning striking and shattering one of the insulators upon one of the poles, thereby causing the dropping of one of the wires from the pole; that the dropping of the wire was not caused by any lack of care of defendants, nor by reason of any improper equipment or appliances in connection with defendants' system, nor was it caused through any lack of inspection of the system and equipment, but solely through an act of God; that immediately upon the discovery of the accident defendants shut off, the power at the plant in the city of St. Cloud, and immediately removed all danger to persons or property by reason of said accident to its pole and wire; that the parents of decedent minor neglected and failed to advise her of the danger and proximately caused the injury in not advising her of the danger and in not controlling her and keeping her away from contact with the wires. The case was tried before Nye. J., who denied defendants' motion for a directed verdict, and a jury which returned a verdict of \$4,000. Defendants' motion for judgment notwithstanding the verdict was denied, and their motion for a new trial was granted unless plaintiff consented to a reduction of the verdict

to \$3,400. From the order denying their alternative motion, defendants appealed. Affirmed.

J. D. Sullivan and Joseph B. Himsl, for appellants. James J. Quigley and W. F. Donohue, for respondent.

DIBELL, C.

Action to recover for death by wrongful act. There was a verdict for the plaintiff. The defendant appeals from the order denying its alternative motion for judgment or a new trial.

1. The defendant operates an electric light and power plant at St. Cloud. One transmission line extends to the southwest through the village of Richmond 20 miles away. The current is carried on overhead wires along public highways. The line has three wires and carries a 16,500 voltage. In the early morning of July 25, 1916, one of the wires near Richmond broke. One end fell across a wire fence along the road and electrified the wires. The current followed a cross fence leading from the road fence, and at a distance of some 2,000 feet from the break the daughter of the plaintiff, between 5 and 6 years old, came in contact with a wire several hours later and was electrocuted.

There was evidence that the break was caused by a bolt of lightning. If so the defendant, if there was no accompanying or subsequent negligence on its part, was not liable. Assuming that the lightning caused the break, the plaintiff claims that the defendant was negligent in not sooner locating the break and taking such action as would have prevented the killing of the child.

In the power plant was an instrument called a current breaker. At 4:30 in the morning it "threw out." This indicated a serious disturbance on the line. To those experienced in electrical plants it meant that there were likely two wires down. One down wire might but usually would not bring this result. The night operator telephoned the superintendent. He at once took his automobile, got two linemen, and started in search of the trouble. He went along the line several miles until he came to the branch going north to St. Joe. He followed the branch until he found a wire down and a resultant ground a mile south of the village. He repaired it and returned to St. Cloud about 7:30 and went about other work, first sending two men with an automobile to the west to patrol

the line, that is, to go along the line and look for trouble. There had been an electrical storm the night before and it was customary to patrol after such a storm. There was no such active search maintained for a down wire as resulted in the discovery of the one near St. Joe. The voltmeter and other instruments in the plant continued to warn of disturbances on the line. At about 8:50 the company's representative at Richmond, having been informed of the ground a short-distance out, telephoned the plant and the current was at once turned off. shortly after the girl was killed. It was the opinion of the defendants' experts that the Richmond wire and the St. Joe wire were down at 4:30 and caused the current breaker to throw out at that time. Just what information the night operator gave the superintendent is not shown. It is not important. Whatever information the current breaker disclosed the company had. This information suggested two down wires at 4:30. The search resulted in finding one near St. Joe. It was not continued with the same active diligence.

The principle of law applicable is not in doubt. The company was not an insurer. The measure of its duty was the exercise of ordinary care. It was using a dangerous agency. If not controlled and guarded it might do great injury. The amount of care required to constitute ordinary care under such circumstances is care commensurate with reasonably apprehended dangers and risks. Musolf v. Duluth Edison Electric Co. 108 Minn. 369, 122 N. W. 499, 24 L. R. A. (N. S.) 451; Gilbert v. Duluth General Electric Co. 93 Minn. 99, 100 N. W. 653, 106 Am. St. 430. The break was apparent on casual observation. It was not hidden. Fence posts were burning along the fence towards the plaintiff's house. line was along a much traveled highway through a thickly settled farming community. It could be quickly reached. The jury was justified in concluding that with all the information the defendant had at 4:30 in the morning and from then on it was its duty to exercise very active and persistent diligence until it located the two grounds or found that there was but one; that it did not maintain a sufficiently active search after discovering the one at St. Joe; and that it failed in the exercise of the ordinary care which the situation demanded. The evidence sustains the finding of negligence.

- 2. The defendant complains that the court did not charge that a bolt of lightning caused the break. The evidence is persuasive that it did. However, there was evidence, opinion in character, that it came from a mechanical strain. There was no error in the charge in this respect. Besides the case was not put to the jury upon the theory that there was actionable negligence in the defendant in respect of the breaking of the wire.
- 3. The defendant urges that the court erred in refusing to charge as requested that "there is no evidence in this case that defendant company had actual notice of the damage to its line at the point referred to in this case, near Richmond, until notified of it by Mr. O'Ryan." O'Ryan was the one who notified Schwankl, the defendant's agent at Richmond, who telephoned the plant about 8:50. The court charged that "there is no proof that Mr. Schwankl, of Richmond, received actual notice of the breakage of this wire until he was notified by Mr. O'Ryan." It was not claimed that the company had actual notice of the ground near Richmond except as it came to and through Schwankl, and immediately upon getting it he telephoned. The instruction was the substantial equivalent of that asked and was sufficient.
- 4. The evidence was not such as to require a finding that the plaintiff and his wife, who are the sole beneficiaries, were negligent in respect of the care of the child. We assume as we have frequently done that such negligence would bar a recovery. See Kokesh v. Price, 136 Minn. 304, 161 N. W. 715; 2 Illinois Law Rev. 487.

The plaintiff's house was about a half mile, measured at right angles, from the place where the wire broke. The child was killed about 500 feet from the house in a lane leading from the public road passing the house. About six o'clock in the morning the plaintiff, when getting his cows, saw that a wire was down and that some of the fence posts were burning. He told his wife. They purposely kept information from the children. It is likely that they feared they would be attracted to the place and that there was danger. About 7 o'clock the plaintiff went to Richmond. The children were playing about the house. Their mother was engaged about her household work. She did not notice their leaving. Apparently they went out on the public highway in anticipation of their father's return, and coming to the lane were attracted by the burning

fence posts estimated to be 238 feet down the lane, and went there. Upon such facts negligence of the parents cannot be predicated as a matter of law. See Mattson v. Minnesota & N. W. R. Co. 98 Minn. 296, 108 N. W. 517; Gunderson v. Northwestern Ele. Co. 47 Minn. 161, 49 N. W. 694.

5. The verdict was for \$4,000 and was conditionally reduced to \$3,400 by the trial court and the plaintiff accepted the reduction. It is claimed that it is excessive. The largest verdict for the death of a child of like age which we find sustained in this state was for \$3,000. Such a verdict was upheld in O'Malley v. St. Paul, M. & M. Ry. Co. 43 Minn. 289, 44 N. W. 440. The damages were characterized as "large." In Gunderson v. Northwestern Ele. Co. 47 Minn. 161, 49 N. W. 694, the verdict was for \$5,000 and was reduced to \$3,000. It was held so excessive as to require a new trial. These cases were decided more than 25 years ago. Conditions have changed. The damages under consideration, since they are based solely on pecuniary loss, are, under our decisions, liberal. We cannot say that they are so excessive as to require a new trial.

Order affirmed.

EMMA C. POMROY v. JOHN C. BEATTIE.1

January 4, 1918.

No. 20,643.

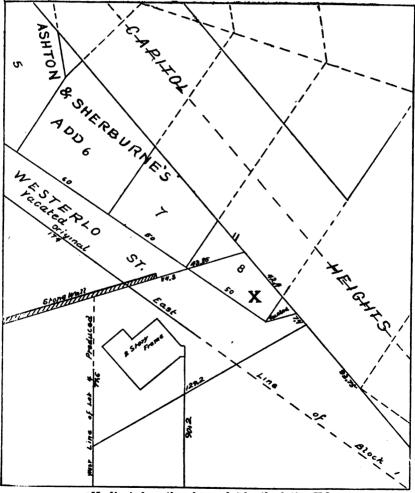
Taxation — expiration of time to redeem — service of notice upon occupant.

1. Under section 2148, G. S. 1913, requiring service of notice of the expiration of the time of redemption from a tax sale of real property, if there was occupancy which would require notice to be served, if the one in possession was the owner, then service of the notice on the occupant would be necessary, though the one in possession was there without title.

Same.

2. Under the evidence it appears that the occupancy of the premises was such as to require service of notice of the expiration of the time of redemption from a tax sale upon the occupant.

¹Reported in 165 N. W. 960. [Five years and eight months. Reporter.] Action in the district court for Ramsey county to determine adverse claims to that part of the lot described in the first sentence of the opinion which lies southwesterly of Capitol Heights, a public street in the city of St. Paul.¹ The answer alleged that defendant was the owner in fee simple of the premises described. The reply set up that defendant claimed title through a tax sale and a Governor's deed thereof, and alleged that plaintiff was in actual possession of the premises at the time the



¹[Indicated on the above plat by the letter X.]

deputy sheriff made return on the notice of expiration of redemption that they were vacant and unoccupied. The case was tried before Michael, J., who made findings and ordered judgment in favor of defendant. From an order denying his motion for a new trial, plaintiff appealed. Reversed.

Owen Morris, for appellant.

R. A. Walsh, for respondent.

Quinn, J.

This is an action to determine adverse claims to a parcel of land in lot 8, block 23, Ashton and Sherburne's Addition to the city of St. Paul. The plaintiff claims title thereto by adverse possession, and the defendant, John C. Beattie, claims title to the same by virtue of a tax deed from the state. At the trial the district court found that plaintiff had no interest in the premises; that the defendant Beattie was the owner thereof, and ordered judgment accordingly. From an order denying her motion for a new trial, plaintiff appealed:

The controlling question for determination is: Were the premises vacant and unoccupied when the sheriff attempted to serve a notice of the expiration of the time of redemption from a tax sale on February 5, 1908?

On February 4, 1908, the county auditor of Ramsey county issued a notice of the expiration of time of redemption under a tax sale directed to William Dawson, as to the premises in question. On the following day the sheriff returned that he could not find Dawson; that he had personally visited the premises and that the same were vacant and unoccupied, and thereafter the notice was published.

The parcel of land in question is located in that part of lot 8 which lies to the southwest of Capitol Heights, and, for the purpose of getting an idea of the relative location of the different parcels of land referred to, may be described as follows: Beginning near the westerly corner of lot 8, running thence southeasterly on the line of said lot to the southerly corner thereof, thence northeasterly on the line of said lot 17 feet to the westerly line of Capitol Heights, thence northwesterly 33 feet on the line of said street, and thence westerly in a straight line to the place of beginning.

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Westerlo street was laid out many years ago, and extended from the southeast to the northwest, the easterly line thereof forming the westerly boundary of the premises in question. This street was about 25 feet wide, never opened to the use of the public and was vacated in 1902. Immediately across this vacated street from the premises in question is a small parcel of land owned by the plaintiff, upon which is situated dwelling house No. 687, by which number this parcel will be hereinafter designated.

It is the contention of the plaintiff that the parcel in controversy, together with the vacated portion of Westerlo street adjacent thereto, constitutes the front yard to the dwelling above referred to, and that she and her immediate predecessors have been in the actual and continuous possession thereof, claiming to own the same for more than 15 years immediately prior to the commencement of this action.

The dimensions of the three parcels taken together are 74.6 feet on the west, 84.3 feet on the north, 49.8 feet on the east and 129.2 feet on the south. The same is located upon what might be called a hillside sloping from the west toward Capitol Heights on the east.

The dwelling is quite a large structure built about 26 years ago, at which time a stone wall about 4 feet high was built from the dwelling house south to the property line, thence east on the property line to Capitol Heights. The earth from the higher portions of the premises was graded in against this wall so as to make a level yard. There was a retaining wall along the west line of considerable height, and a stone wall 10 feet or more high extending from the northwest corner of the premises east along the north line to about the middle of Westerlo street, and a plank or board wall or fence extending from the east end of this wall in a direct line to Capitol Heights. There was a sidewalk along Capitol Heights on the east of the premises in question. The dwelling house faces to the east on Capitol Heights. A gravel walk about 4 feet wide extends from the front door of the dwelling across the vacated portion of Westerlo street and the premises in controversy to the sidewalk on Capitol Heights.

The plaintiff contends that the walls upon the north and south lines above referred to mark the northerly and southerly boundaries of the front yard to the dwelling house. While all that portion of lot 8 lying

west of Capitol Heights is described in the complaint, the plaintiff, upon the trial, laid claim only to that portion south of the plank wall or fence above referred to, and made no claim to that portion lying adjacent to the defendant's premises in lot 7, north of that wall or fence.

John E. Loftfield, with his family, resided in the dwelling No. 687 as plaintiff's tenant for 4 years commencing in 1906, during which time he occupied the premises in question and the vacated portion of Westerlo street as the front yard to his residence. He kept the lawn between the residence and Capitol Heights nicely mowed and used and occupied the same in such manner as to give it the appearance of a small front yard to his residence. He had a small garden thereon and had clothes lines attached to the trees for family use. The distance from the dwelling to the sidewalk on Capitol Heights is about 55 feet. The gravel walk was used by the occupants of the dwelling. About these matters there is no dispute in the testimony.

The trial court seemed to give much weight to the thought that whatever occupancy was made by the plaintiff and her tenants of the premises in question amounted to a mere trespass, and in no way affected defendant's title. However this may be, if there was an occupancy of the premises by plaintiff's tenants residing in the dwelling, then the notice of the expiration of the time of redemption should have been served upon such tenant. Section 2148, G. S. 1913, requires notice of the expiration of the time of redemption of real property from tax sale to be served upon the person to whom it is directed, if to be found in the county, in the same manner prescribed for the service of a summons in a civil action, and if not so found, then upon the persons in possession of the land, and if the person to whom the notice is directed cannot be found in the county and there is no one in possession of the land, the service shall be made by three weeks' published notice.

We think the testimony shows that the occupancy of the premises in question during the year 1908 was such as the owner necessarily and naturally would have made had he resided in the dwelling. It stands undisputed that the vacated portion of Westerlo street and the parcel in question furnish in appearance at least a small front yard to the dwelling, and that during the year 1908 it was occupied by plaintiff's tenant as such. Suppose the plaintiff at the time had resided in the

dwelling and also held title to the parcel in question and occupied it in the manner in which it was occupied. Could it be said that service of the notice need not have been made upon her simply because it was addressed to Dawson?

Under the rule announced in Fitger v. Alger, Smith & Co. 130 Minn. 520, 153 N. W. 997, we think the notice should have been served upon the plaintiff's tenant residing in the dwelling. That was an action to set aside a mortgage foreclosure sale which involved the service of the notice of sale. Section 8111, G. S. 1913, provides that:

"Six weeks' published notice shall be given that such mortgage will be foreclosed by sale of the mortgaged premises or some part thereof, and at least four weeks before the appointed time of sale a copy of such notice shall be served in like manner as a summons in a civil action in the district court upon the person in possession of the mortgaged premises, if the same are actually occupied. * * * "

And under this statute it was held that "if there was the possession which would require notice of foreclosure if the one in possession was the owner notice was required though the one in possession was there without authority or license."

This rule applies in the case at bar, and the notice should have been served upon plaintiff's tenant residing in dwelling N ρ . 687. It follows that there was not sufficient service, and for that reason it was error to hold that the defendant, Beattie, was the owner and entitled to the possession of the premises in question. The plaintiff is entitled to a new trial.

Reversed.

STATE v. A. A. KAMPERT.1

January 4, 1918.

No. 20,655.

Oriminal law — date of crime — refusal to charge jury.

1. The eye-witness to the offense testified that it was committed on 1Reported in 165 N. W. 972.

either November 4, 5, or 6, 1915, that she believed it was before the sixth, but could not say so positively. Under this testimony an instruction that the jury must acquit, unless they found that the act was committed on either the fourth or fifth was properly refused.

Same — indefiniteness in charge.

2. At the close of the charge, defendant suggested that the jury should be directed to acquit, unless they found that the offense had been committed at the place and under the circumstances testified to by the eyewitness. Thereupon the court stated that the jury would not be warranted in convicting, unless they found from all the evidence that defendant had committed the offense on or about November 4. As the evidence was directed to the proof of this single offense and there was no proof of any other, the failure to define the offense more specifically was not error.

Same — circumstantial evidence.

3. Giving a brief correct instruction in respect to circumstantial evidence was proper, although the principal evidence for the prosecution was the testimony of an eye-witness.

Same — evidence affecting credibility of witness.

4. Evidence tending to show a disposition on the part of a witness to withhold the truth by concealing facts is admissible for the purpose of showing bias and impugning the credibility of the witness, and the court did not abuse its discretion as to the admission of such testimony.

Same — conduct of prosecutor — failure of wife to testify.

5. The prosecuting attorney cross-examined defendant as to his reasons for refusing to permit his wife to testify, but discontinued that line of questions as soon as objection was made. In his address to the jury, he commented upon this testimony and upon defendant's failure to call his wife as a witness. It appeared defendant's wife was prosecuting an action for divorce against him and if permitted to testify would be a hostile witness. Held that while the conduct of the prosecuting attorney is disapproved, it does not constitute reversible error under the circumstances disclosed.

Verdict sustained by evidence.

6. The evidence is sufficient to sustain the verdict.

Defendant was indicted by the grand jury for the crime of carnal knowledge of a female child under the age of 18, tried in the district court for Martin county before Tifft, J., and a jury which returned a

verdict of guilty. From an order denying his motion for a new trial, defendant appealed. Affirmed.

Ballou & Ballou and Dunn & Carlson, for appellant.

Lyndon A. Smith, Attorney General, and John E. Palmer, Assistant Attorney General, for respondent.

TAYLOR, C.

Defendant was convicted of the crime of carnal knowledge of a girl under the age of 18 years, and appeals from an order denying a new trial.

The errors assigned are: (1) That incorrect instructions were given to the jury and correct instructions were refused; (2) that improper testimony was admitted to contradict and impeach the girl who was a witness for defendant; (3) that the prosecuting attorney was guilty of misconduct; and (4) that the evidence is not sufficient to sustain the conviction.

1. The indictment charges the offense as committed on November 4, 1915. The step-mother of the girl was the principal witness for the state. She testified that while looking for eggs in the barn she discovered defendant and the girl in the act of sexual intercourse, but was unable to fix the exact date. She knew that defendant's wife had left him on Tuesday, November 2, and states that the act was committed after that date but during that same week. On cross-examination, after her attention had been called to a cattle deal which took place on Wednesday, November 3, she stated that it could not have been on that day. Defendant's counsel tried to induce her to fix the time more definitely by eliminating Saturday also. She stated that she thought it was before Saturday and in a couple of instances assented to the statement, in the form of a question, that it must have been on Thursday or Friday; but both before and afterward made answers framed by herself, which included Saturday as one of the days on which it might have taken place. Her testimony taken as a whole is to the effect that while she thought it was before Saturday it might have been on that The importance of eliminating Saturday arose from the fact that defendant had presented testimony tending to prove an alibi on Thursday, Friday and Saturday, but the evidence as to Thursday and Friday was stronger than that as to Saturday. He requested the court

to charge that the jury must acquit, unless they found that the act had been committed on Thursday or Friday, and urges the refusal to give this instruction as error. The ruling was correct, for the court could not say as a matter of law that there was no evidence which would justify the jury in finding that the act was committed on Saturday.

The court, after explaining fully the presumption of innocence and that defendant was entitled to a verdict of not guilty, unless the jury found every material allegation of the indictment proven beyond a reasonable doubt, instructed the jury that if they found from the evidence beyond a reasonable doubt that defendant committed the act charged on the fourth day of November, 1915, and that the girl was under the age of 18 years they should find defendant guilty. Immediately following this the court stated that the time at which the act was committed is not a material ingredient of the crime charged except that the act must be shown to have been committed before the girl attained the age of 18 years, "but with this qualification the time of the offense need not be precisely stated in the indictment, nor is it incumbent upon the prosecution to prove that the offense was committed at the precise time alleged in the indictment." At the close of the charge, defendant's counsel suggested that unless the jury found "that the defendant committed the act at the time testified-I don't mean the exact day-but * * * I mean, without regard to dates, unless the jury find that the defendant committed that offense substantially as testified to by the complaining witness * * * then there should be an acquittal." The court thereupon stated that: "The jury would not be warranted in finding the defendant guilty unless they found from all the evidence in the case that the offense was committed on or about the * * * fourth day of Nevember." . Defendant's counsel further suggested: "And if proper, Your Honor, at the place and under the circumstances testified to by the prosecuting witness;" but the court made no further statement.

Defendant contends that the general charge above outlined together with the failure to state specifically that in order to convict the jury must find that defendant had committed the particular act testified to by the so-called complaining witness, left the jury at liberty to convict in case they found that defendant had committed any such act

at any time before the girl reached the age of 18 years, and that giving the general charge without giving the requested limitation was error. No claim is made that the general charge, which in its essentials followed the statute did not correctly state the law, but the claim is that without the limitation it left too wide a field open to the jury.

There was evidence tending to prove undue familiarity between defendant and the girl both before and after the offense in question is alleged to have been committed, but no attempt was made to prove the commission of any act constituting the offense other than that testified to by the step-mother, and no claim is made that any other act was shown for which defendant might have been convicted. The testimony was directed to the purpose of establishing this particular offense and no other, and although it might be conjectured from the testimony that other similar acts had perhaps been committed, none were proven. The jury might well have been expressly instructed that defendant was on trial for the offense alleged to have been committed in the barn at the time the step-mother claimed to have caught him in the act, and could be convicted for no other upon that trial, yet as the trial was confined to the attempt to establish this particular offense and there was no evidence which would warrant the jury in finding that he had committed any other, we think it is clear that the jury were not, and could not have been, misled or in doubt as to what they must find in order to convict. Under the facts of this case we are satisfied that the omission did not affect the result in any degree, and was wholly without prejudice.

Defendant also complains because the court gave a brief instruction concerning circumstantial evidence. No claim is made that the instruction was not correct, but in the words of his brief the complaint is that, "notwithstanding the fact that the only evidence to sustain the crime alleged in the indictment was that of a direct eye-witness, the court charged on the law of circumstantial evidence." There was evidence of acts of familiarity between the parties, which, as aptly stated in defendant's brief, was received, "not for the purpose of proving some independent crime, but as tending to characterize the relations of the parties;" and defendant argues that in consequence of the instruction as to circumstantial evidence the jury may have inferred from these

acts of familiarity that defendant was guilty of some other offense and found him guilty for that reason. We find no basis in the record for any such assumption, and are of opinion that the instruction was neither erroneous nor prejudicial.

2. The girl had worked for defendant at his home most of the time from March, 1915, until October, 1915, but had visited a cousin in Iowa for two or three weeks in the middle of the summer. Defendant was a witness in his own behalf, and on cross-examination denied receiving any letters or written communications from the girl while she was on this visit, and also denied writing any to her. Thereupon he was shown a postal card written to him by the girl immediately after her arrival at her cousin's, and admitted that he might have received it. after defendant called the girl as a witness, and she testified that defendant had not committed the act charged, and that no improper relations had ever existed between them. On cross-examination she was asked about the postal card and admitted writing it, but denied writing any letters to defendant or receiving any from him. She was then asked if she had not received a letter purporting to bear the signature of defendant which her cousin had seen and read, and if her cousin had not taken her to task for having such a letter from a married man. She denied receiving or having any such letter or that her cousin had upbraided her on account of any such letter. She was further asked whether her cousin had not taken the letter away from her and finally given it back to her. She denied any such transaction. At this point defendant's counsel objected to this line of questioning saying: "Take both the defendant and this witness, * * * he is asking them about a line of conduct that I am satisfied that counsel doesn't intend to establish. It is merely for prejudicial effect." The prosecution produced the cousin in rebuttal and she was permitted to testify that she had read a letter purporting to bear defendant's signature, received by the girl while at her house, and had upbraided the girl on account of it.

Defendant contends that the girl could not be impeached in this manner, but only by proof of some admission or confession which she had made. It is beyond question that a witness who testifies positively that a specifically described event never happened may be impeached by proof that it did happen, unless the admission of such proof violates

the rule against impeaching a witness upon collateral matters. The objection to the evidence in question was not based upon the ground that it related to a collateral matter, and the assertion that the questions asked the girl were asked merely to produce a prejudicial effect without any intention of establishing that such an occurrence had happened, made it proper for the prosecution to show that such was not the purpose. Evidence tending to show a disposition on the part of a witness to withhold the truth by concealing the facts, is admissible for the purpose of showing bias and impugning the credibility of the witness.

The testimony in question, if believed, tended to show such a disposition on the part of the witness, and we think that the trial court did not abuse its discretion in admitting it. Alward v. Oakes, 63 Minn. 190, 65 N. W. 270; State v. Arthur, 135 Iowa, 48, 109 N. W. 1083; State v. Mulhall, 199 Mo. 202, 97 S. W. 583, 7 L. R. A. (N. S.) 630, 8 Ann. Cas. 781; State v. Forsha, 190 Mo. 296, 88 S. W. 746, 7 L.R.A.(N.S.) 576; Larkin v. Saltair Beach Co. 30 Utah, 86, 83 Pac. 686, 3 L. R. A. (N. S.) 982, 116 Am. St. 818, 8 Ann. Cas. 977; Long v. State, 59 Tex. Cr. 103, 127 S. W. 551, Ann. Cas. 1912A, 1244; Denver City Tramway Co. v. Lomovt, 53 Colo. 292, 126 Pac. 276, Ann. Cas. 1914B, 106; State v. Goodson, 116 La. 387, 40 South. 771; Lynds v. Town of Plymouth, 73 Vt. 216, 50 Atl. 1083; Commonwealth v. Goodnow, 154 Mass. 487, 28 N. E. 677; Dilcher v. State, 39 Oh. Şt. 130; Tiller v. State, 111 Ga. 840, 36 S. E. 201.

3. The assistant attorney general who tried the case called defendant's wife as a witness, but upon the objection of defendant her testimony was excluded. It appeared that she had separated from defendant and had brought an action against him for divorce which was pending at the time of this trial. When defendant was upon the stand, the prosecuting attorney cross-examined him at some length as to why he was unwilling for his wife to testify. The first objection made to this line of questions was sustained, and no further questions of that nature were asked. In his address to the jury, the prosecuting attorney commented upon the reason given by defendant for not permitting his wife to testify, and also upon his failure to call her as a witness in his own behalf to contradict other testimony. Defendant insists that the prosecuting attorney was guilty of such misconduct in these respects that

the verdict ought not to stand. The statute (G. S. 1913, § 8375), made the testimony of defendant's wife inadmissible without his consent, and did not require him to give any reason for refusing to permit her to testify. The cross-examination complained of was improper, but was discontinued as soon as objection was made. The testimony admitted without objection furnished a basis for the comments made, and the comments were confined to the suggestion of inferences therefrom and from the obvious fact that the wife had not testified. It clearly appeared that defendant's wife would be a hostile witness if he permitted her to testify, and this fact was apparent to the court and jury independent of the testimony and comments here in question. There can be no fair justification for a proceeding of this kind in a criminal prosecution, particularly in a case where the hostility of the wife is apparent and not questioned. The prosecuting attorney represents the state and should conduct the trial with a due regard for the rights accorded to the accused by the law, and should be promptly checked by the trial court whenever he so far forgets himself as to trench upon such rights. While all the members of the court disapprove of the conduct complained of and consider it as presenting the most serious question in the case, yet the majority of the court are of the opinion that under the circumstances disclosed by the record this conduct did not constitute reversible error.

4. Defendant also contends that the verdict is not warranted by the evidence. The step-mother of the girl testified positively that she saw defendant commit the act constituting the offense. Both defendant and the girl testify positively that they never committed any such act at any time. The testimony of the step-mother is not so inherently improbable that the court can rule as a matter of law that the jury were not justified in believing it. The evidence brought the case squarely within the province of the jury, and we find no sufficient ground for setting aside their verdict.

Order affirmed.

JEREMIAH P. HARNEY v. DANIEL HARNEY.1

January 4, 1918.

No. 20.667.

Cancelation of instrument — offset for use and occupation.

The refusal of the trial court to find that defendant was the owner in fee of certain real property, and the further refusal to find that he was entitled to rent for the use and occupation thereof by plaintiff, held sustained by the evidence.

Action in the district court for Wabasha county to cancel defendant's interest in a certain deed from plaintiff; to secure a decree that defendant's title in certain real estate acquired under execution sale is held in trust for plaintiff, and to recover \$3,622.12. The defense is set out in the fourth paragraph of the opinion. The case was tried before Granger, J., who made findings and ordered judgment against defendant for \$1,629.97. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

George H. Hammond, for appellant.

Henry W. Morgan, for respondent.

Brown, C. J.

Thomas Harney, late of Olmsted county, died intestate on April 8, 1911, leaving real and personal property of the value of over \$50,000. He was survived by his widow and 10 children, sons and daughters of mature years. His estate was duly administered in the probate court and by final decree of date of January 22, 1913, assigned to the heirs in accordance with the statutes of descent and distribution; a one-third interest being decreed to the widow, and an undivided one-fifteenth interest to each of the sons and daughters, including plaintiff and defendant in this action. The land here involved was a part of the estate and was decreed to the heirs in the proportions just stated. At

1Reported in 165 N. W. 967.

the time of the death of decedent and for some time prior thereto, plaintiff with his wife and family resided upon the land and cultivated it in his farming operations. Plaintiff's business capacity appears not to have been good. He was involved in financial difficulties, largely in debt, and unable to meet his obligations. The heirs of the estate understood fully his situation, particularly his mother, and they were all desirous of protecting his family and securing to them the benefits of the inheritance soon to fall to him. With this end in view it was finally agreed that plaintiff should make a general assignment and transfer of his rights and interest in the estate to defendant, who agreed to accept and manage the same for the use and benefit of plaintiff and members of his family. The transfer was made, and thereunder and by virtue thereof defendant received from the administratrix of the estate plaintiff's share therein, amounting to the sum of \$3,622.12. Of this there is no dispute, though defendant claims that the amount so received by him did not exceed the sum of \$3,522.12, or \$100 less than the amount claimed by plaintiff.

In respect to the real property, which plaintiff occupies with his family, the evidence tends to show, though disputed by defendant, that all the heirs agreed to convey the same to defendant to be held by him for the use and benefit of plaintiff and his wife and children; the plaintiff and wife to have a life estate therein, and, when plaintiff's financial difficulties were overcome, defendant was to convey the land to the children subject to such life estate. The heirs conveyed to defendant, but the deed is in the usual form of such instruments and contains no conditions or reservations of the character stated, but purports to convey the title absolute to defendant. The deed was so executed on August 31, 1912. Thereafter plaintiff continued in the occupancy of the land as before and precisely as though he held the fee title thereto.

Plaintiff a year or so later repudiated and rescinded the assignment of his share of the estate to defendant and demanded a return thereof to him. He also demanded that defendant convey the land to him. Defendant refused compliance with either demand, and plaintiff brought this action to enforce the same. The complaint set out in detail the facts stated with one qualification. It alleges that the agreement with his heirs at the time the land was conveyed to defendant was that he

should, when plaintiff's financial troubles were over, reconvey the same to plaintiff. The evidence shows the fact to be as heretofore stated, and that the conveyance from defendant was to be to the plaintiff's children, subject to a life estate in plaintiff and his wife. But with this exception the facts pleaded disclose in a general way those heretofore stated.

Defendant by his answer admitted the receipt of the share of the estate, aside from the land, assigned to plaintiff by the probate decree, the same to be used in the payment and discharge of his debts and obligations. And, in justification of his refusal to pay over any part of the property so received pursuant to plaintiff's demand, he alleged that the whole thereof had been expended in the payment of just and legal claims against plaintiff, and that defendant had thereby fully discharged his duty under the trust imposed upon him. The items of debts so paid by defendant are stated in the answer, and include an item of \$2,400, for the use and occupation of the land in question by plaintiff subsequent to the conveyance thereof by the heirs to defendant. And this amount defendant claimed due him for the use of the land, and he presented it as an offset to plaintiff's demand. The basis of this claim is the contention of defendant that the land was not conveyed to him in trust for the use of plaintiff or for the use of his wife or children, but in consummation of a purchase of the same by him from the heirs, and that the deed was intended to vest in him the unqualified fee title to the land.

Upon the issues thus presented the cause came on for trial, and was heard by the court without a jury. The court found in addition to the general facts stated, that there remains in the hands of defendant of the amount received by him as the share of plaintiff in the estate the sum of \$1,629.97, for which judgment was ordered in plaintiff's favor. The court rejected defendant's claim for the value of the use of the land by plaintiff, on the ground that he was not the owner of the land, and therefore was without right to demand the payment of rent for the use and occupancy of the same by plaintiff.

Defendant moved for amended findings, in which he sought to have the court find that he was the fee owner of the land and entitled to the use thereof, but the motion was denied. Judgment was entered on the findings and defendant appealed.

The only question presented is whether the court erred in rejecting and disallowing defendant's claim for the use of the land as an offset to plaintiff's demand. We answer the question in the negative. As heretofore stated the whole foundation for this claim is defendant's alleged ownership of the land. The court expressly declined and refused to find that he was such owner, and with that refusal his claim falls as without support. Our examination of the record leads to the conclusion that the action of the court is fully supported by the evidence and cannot be disturbed. The evidence of witness Spillane is quite persuasive · that the conveyance to defendant by the heirs was to vest title in him for the use and benefit of plaintiff and his wife, in the form of a life estate with the remainder to their children. Though the defendant expressly disputed this evidence the question was one for the trial court to determine. The evidence is not clearly against its conclusion. this view of the case the rights of plaintiff in and to the land are immaterial. Defendant's claim to rent must stand or fall on the strength of his own title, as he has no title his claim disappears.

This disposes of the case, but it should be remarked in conclusion, to obviate any misunderstanding in the future, that we do not consider the question whether defendant has ever parted with the one-fifteenth interest in the land which was decreed to him by the probate decree. For aught that appears from the record be still holds that interest. But that was not the basis of his claim against plaintiff; the question was not brought to the attention of the trial court, and was not referred to in this court, and is therefore passed without further remark, except that the question should not be treated as having been determined in this action.

Judgment affirmed.

STATE v. DAN VAN VLEET.1

January 4, 1918.

No 20.692.

Selection of jury panel — de facto justice of peace — sale of liquor.

The clerk of the district court drew the panels of the grand and petit jury, for the term of court at which defendant was indicted and tried, in the presence of the sheriff and a person who had been duly elected a justice of the peace, had taken the oath of office, had received from his predecessor the records and files pertaining to the office, who had for a week performed all the duties of the office in both civil and criminal cases, but whose official bond had not been filed. It is held:

- (1) The person so present at the drawing of the jury panels was a de facto justice of the peace and his official act, in being the proper person to be present at such drawing, under section 9101, G. S. 1918, cannot be questioned by a motion to set aside the indictment or by a challenge to the petit jury panel.
- (2) The instruction relative to the time the offense was committed was proper.
- (3) No error was made in receiving evidence as to prior sales and in the instruction limiting the bearing of such evidence.
 - (4) The evidence is sufficient to sustain the conviction.

Defendant was indicted by the grand jury for the crime of selling intoxicating liquor without a license, tried in the district court for Freeborn county before Catherwood, J., who denied defendant's motion to quash the indictment, and a jury which returned a verdict of guilty as charged in the indictment. From an order denying his motion for a new trial, defendant appealed. Affirmed.

Moonan & Moonan, for appellant.

Lyndon A. Smith, Attorney General, James E. Markham, Assistant Attorney General, and Norman E. Peterson, County Attorney, for respondent.

¹Reported in 165 N. W. 962.

HOLT, J.

Defendant was indicted and convicted for selling a pint of whiskey in a county where sales of intoxicating liquors are prohibited. He appeals from the order denying a new trial.

1. Defendant was bound over to await the action of the grand jury upon the charge for which he was indicted. Hence it may be doubted that the motion, made at the time of his arraignment, to set aside the indictment for irregularity in the drawing of the grand jury, was timely, for he could have raised the same question by interposing a challenge to the array or panel after the grand jurors were sworn and charged and before they retired. Section 9108, G. S. 1913; State v. Greenman, 23 Minn. 209. We need not determine the point now, for by proper interposition of a challenge to the petit jury panel the same alleged fatal irregularity in the drawing of that jury is presented.

Section 9101, G. S. 1913, applicable to the drawing of the panel of the petit jury as well as that of the grand jury for any term of court, provides that the clerk of court, in the presence of the sheriff and a justice of the peace or district judge, shall draw the same from the box containing the names of the jurors duly selected and certified for the The panels here in question for the May term of court were drawn by the clerk on April 24, 1917, in the presence of the sheriff and one Lane who assumed to be a justice of the peace. The particular objection is that Lane's official bond was not then filed. The facts are these: The city of Albert Lea has two justices of the peace. At an election held April 3, 1917, Lane was duly elected to fill the office and a certificate of election issued to him. On April 7, he took and filed his oath of office. His predecessor in office, on April 17, turned over the dockets and files in his possession as justice of the peace in and for said city to Lane. From and after that date Lane, as justice of the peace, assumed jurisdiction in criminal and civil matters and took the necessary steps in the determination thereof. The city council of Albert Lea must fix the amount of the official bond of a newly elected justice of the peace, and also furnished the bond, as we understand the record. Prior to April 17, Lane had done everything required of him to properly qualify for the office, and in addition to his election the city council on that date appointed him to the office. However, his official bond 139 M.-10

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procured by the city was not filed with the city clerk until April 26, Defendant contends that inasmuch as sections 8239 and 8521, G. S. 1913, forbid a person, elected to a public office, to enter upon his duties as such until the bond required by law is filed and makes it a gross misdemeanor for him to perform the functions of the office without having filed such bond. Lane could not be considered a de facto justice of the peace. To this we do not assent. Although a person elected to an office may in the assumption thereof, as well as in the performance of its duties, transgress the law and subject himself to penalties and forfeiture of office, yet it does not follow that the public acts done while so exercising the functions of the office are of no effect and void. We are of opinion that Lane was on April 24, 1917, when present at the drawing of the grand and petit jury panels for the coming May term of court, a de facto justice of the peace. The former justice had surrendered the office to Lane, and the latter had assumed and discharged all the functions thereof for a week prior to the drawing of the jury. State v. McMartin, 42 Minn. 30, 43 N. W. 572; 24 Cyc. 405 and 406; People v. Payment, 109 Mich. 553, 67 N. W. 689; People v. Terry, 108 N. Y. 1, 14 N. E. 815.

The cases of Commonwealth v. Graddy, 4 Metc. (Ky.) 222, and Bruner v. Superior Court, 92 Cal. 239, 28 Pac. 349, cited and relied on by defendant, are not very helpful. They relate to the original selection or authentication of the jury lists and not to the drawing therefrom of the panels for the different terms of court. This was also the case in State v. Schumm, 47 Minn. 373, 50 N. W. 362. In State v. Malloy, 91 S. C. 429, 74 S. E. 988, the state admitted the disqualification of a jury commissioner. Authorities from Louisiana are not in point for the Constitution and statutes of that state differ from ours in respect to the qualification of jury commissioners and the procedure in obtaining juries.

- 2. The contention of counsel and the testimony undoubtedly furnished the appropriate occasion for the instruction bearing upon the materiality of the time at which the allèged sale had taken place. The instruction was proper.
- 3. Defendant had been interested in the soft drinks parlor at which this alleged illegal sale was made 4 or 5 weeks prior thereto. He denied

the sale. On cross-examination he was asked whether he had ever sold whiskey to Sorenson, the prosecuting witness. Sorenson was called in rebuttal and testified, over defendant's objection, to buying whiskey of defendant on two different occasions before the date of the sale named in the indictment. This was not impeachment on a collateral issue. Whether in this soft drinks parlor defendant kept whiskey for sale had an important bearing upon the sale in question. The time of these other sales was not too remote, having in mind the short period that defendant had been connected with the place. In the charge the effect of this testimony of former sales was quite clearly and correctly limited.

4. With great earnestness and confidence the able attorney of defendant argues that the evidence does not sustain a conviction. It is true Sorenson alone testified to the sale and defendant denied it. Sorenson's reputation was questioned by the state's own witness, Jud Flannigan, and character witnesses vouched for the honesty and integrity of defendant. But with all this a reading of the record is persuasive that the jury did not go astray. Sorenson was sober when he met Flannigan and one Peterson early in the forenoon of April 7, 1917. Flannigan within an hour or two furnished him money, at two different times, one dollar each time. Sorenson, within a few minutes of receiving the first dollar, met the same parties at a secluded spot in Albert Lea, a few blocks from the soft drinks parlor of defendant, and produced a pint bottle of whiskey which the three joined in consuming. Thereafter he got the other dollar, went to another place and got another pint bottle of whiskey. Sorenson became drunk and was arrested about noon, and late in the afternoon the preliminary examination was had. Sorenson then, as upon the trial, testified to buying the first bottle from defendant at his soft drinks parlor and the second from another man at a different establishment. He was perfectly sober when the first bottle was bought. For some years he had had his home in Albert Lea and worked for the city upon its streets. He was therefore thoroughly familiar with the location of defendant's place of business and knew him. There is not the slightest suggestion that he harbored any ill-will toward defendant or willingly started or aided the prosecution. And there seems to have been no opportunity for any one improperly to procure Sorenson to

saddle the crime, which evidently had been committed by some one, upon defendant. The verdict of guilty has been approved by the trial court, and we see no good reason for disturbing the conviction.

Order affirmed.

FREDERICK C. PENNEY v. COUNTY OF HENNEPIN.1

January 4, 1918.

No. 20,786.

Refund of tax — no appeal from allowance by county board.

An order of the board of county commissioners, granting a demand under Laws 1917, c. 418, for the refundment of taxes is not the allowance of a claim against the county within G. S. 1913, § 674, providing for an appeal to the district court from the allowance or disallowance of a claim by the county commissioners. The pretended appeal was properly dismissed.

In the matter of the claim of Frederick C. Penney against the county of Hennepin, the board of county commissioners for that county allowed \$24,056.68. From the decision of the board the county attorney, on behalf of the county, appealed to the district court, where the respondent's motion to dismiss the appeal was granted by Steele, J. From the judgment of dismissal, the county of Hennepin appealed. Affirmed.

John M. Rees, County Attorney, and Frank J. Williams, Assistant County Attorney, for appellant.

John F. McGee and Arthur M. Higgins, for respondent.

Bunn, J.

Chapter 388, p. 1005, Sp. Laws 1891, recited that Frederick C. Penney and Joseph Badger, of the city of Minneapolis, did during the years 1884, 1885, 1886 and 1887, expend large sums of money in filling and grading the streets, avenues and alleys in Badger and Penney's Addition to Minneapolis, and Badger and Penney's Second Addition to Minneapolis, by reason whereof the taxable valuation of the property in said

¹Reported in 165 N. W. 965,

additions was greatly enhanced and the taxes thereon correspondingly increased; that the taxes for the years 1884 to 1890, both inclusive, have been unjust, unequal and excessive; that Joseph Badger had assigned to Frederick C. Penney all claims by reason of such filling and grading. The act then provides that the board of county commissioners of Hennepin county be and hereby is authorized to "ascertain the amount of such taxes in excess of what was just, equal and reasonable, if any, and thereupon to order the county treasurer to refund such amount to the said Frederick C. Penney." It further provides that upon the making of such order by the board the county treasurer "shall pay * * * the amount specified in said order when such moneys are paid into said treasury."

In the year 1909, eighteen years after the above special law went into effect, Penney applied to the board of county commissioners for a refundment under the act. The board appointed a special committee of real estate men to investigate as to the amount of the excess taxes paid, if any, and report to the board. The committee made an investigation and reported that excess taxes had been paid by Penney and Badger to the amount of \$24,056.58, and recommended that this sum be paid to Penney. The board of county commissioners adopted a report of the committee of the whole, recommending that the report of the special committee be adopted, and the amount recommended by that committee be added to the annual estimate of the board in July, 1909. The amount was not paid, but for what reason the record does not show. The matter appears to have rested in this situation until after the passage of Laws 1917, p. 627, c. 418.

Laws 1917, p. 627, c. 418, is entitled "An Act legalizing certain claims against counties now having a population of 300,000 inhabitants or over and authorizing and directing their payment and the manner thereof." Section 1 of the act provided that: "In any case prior to the date of the passage of this act in which any county of this state now having a population of 300,000 inhabitants or over, wherein the board of county commissioners of such county have been authorized or empowered to refund, pay or repay to the person or persons entitled thereto, moneys at any time heretofore paid for taxes on real estate in such county, the taxable value of which real estate has been enhanced by the grading and filling of public streets, avenues and alleys at private

expense, and the amount of taxes so paid by reason of such enhancement has been ascertained and determined by the board of county commissioners of such county, such person or persons entitled to said refundment, payment or repayment shall be entitled to recover from such county the full amount so ascertained and determined, without interest thereon." Section 2 of the act provides that the person or persons desiring to avail themselves of section 1 shall within 6 months after the passage and approval of the act, demand of the board of county commissioners of such county the amount of such refundment, payment or repayment, and that the board "shall, within thirty (30) days from the date of said demand, direct the proper officers of said county to issue a warrant or warrants therefor." It is provided that said officer or officers shall immediately draw a warrant or warrants for the full amount, and that said warrant or warrants shall be paid by the county treasurer of such county out of moneys in his possession not otherwise appropriated by law. Section 3 directs the levy of a tax to make provision for the payment of such demands for refundment, etc., in case there are not sufficient funds in the treasury. Soon after the approval of this act, Penney made a written demand of the board of county commissioners for the payment of the sum of \$24,056.58, "ascertained and determined" by the board under the 1891 act. committee on claims reported that the board was authorized by the act of 1891 to pay Penney's claim, that in 1909 it determined and ascertained the amount of said claim to be \$24,056.58, and that the legislature by the act of 1917 made mandatory the payment of this claim by the board. For these reasons the committee recommended that the "claim" of Penney be "allowed" to the amount of \$24,056.58, to be paid from moneys not otherwise appropriated, as provided by the 1917 act. The board accepted and adopted this report.

The county attorney, on behalf of the county of Hennepin, appealed to the district court from the "decision" of the board "allowing" the claim. On motion of Penney, the court dismissed the appeal. Judgment was entered accordingly, and the county appeals to this court.

The purported appeal was dismissed by the trial court on the ground that it had no jurisdiction to hear or determine the matters involved in the proceeding. Respondent contends that this is so because the "right"

to a refundment created by the act of 1917 is not a "claim" within the meaning of G. S. 1913, § 674, providing for an appeal to the district court from the allowance or disallowance of a claim by the board of county commissioners. Appellant contends that the action of the board amounted to the "allowance" of Penney's claim, and that it is immaterial that the act of 1917 gave the board no discretion, but was mandatory in the direction to the board to order the "claim" paid.

There can be no doubt of the mandatory character of the 1917 act. Under its terms all Penney had to do was to "demand" of the board the amount of the refundment. He did not need to file a claim; a simple demand, which might be oral, was all that was necessary to make it obligatory upon the board to direct within 30 days the issuance of a warrant for the amount. The action of the board, though in form an "allowance" of the "claim" of Penney, was based entirely on the fact that the legislature had ordered it to refund to Penney the sum of \$24,056.58. The form of the direction to refund is not material. There was absolutely nothing for the board to do, unless it disregarded the act, but to obey its terms, nothing whatever to decide.

The county, by its attempted appeal to the district court, sought to have decided the validity of the act of 1917, which it attacks as special legislation. It contends now that unless an appeal lies from the action of the board, that action is final. Counsel rely on these cases: Ryan v. County of Dakota, 32 Minn. 138, 19 N. W. 653; in which the court declared that the right of the county to appeal cannot be controlled by the character of the claim allowed against it; Old Second National Bank v. Town of Middletown, 67 Minn. 1, 69 N. W. 471, in which the court held it necessary to file a claim, though the amount had been agreed upon and the time of payment fixed; State v. District Court of St. Louis County, 90 Minn. 457, 97 N. W. 132; State v. Peter, 107 Minn. 460, 120 N. W. 896, in which we said that the board in passing on claims against the county acts quasi judicially, and that when it has once finally acted, without fraud or mistake in the premises, its action is final and binds the parties, unless there be an appeal. Respondent relies upon City of Fergus Falls v. Board of Commrs. of Otter Tail County, 88 Minn. 346, 93 N. W. 126, and Merz v. County of Wright, 114 Minn. 448, 131 N. W. 635. In the Merz case we held that the statute providing for an appeal from the allowance or disallowance of a claim by a board of county commissioners was not applicable to a case where a certificate of the engineer in drainage proceedings that the work had been completed and the contract performed was presented for approval to the board by the contractor, and approval and payment refused. The decision was on the ground that the contractor's right to payment was founded on the contract, and the amount determined thereby, and by the number of yards of excavation. We said: "The right of the contractor to compensation is in no manner within the control of the commissioners."

Our view is that the case at bar is within the reasoning of the Merz case. It is in fact a stronger case than the one referred to as the board in the Merz case did have something to determine, whether the contract had been performed, whether the certified yards of excavation were correct. Here, as we have already said, the board had absolutely nothing to decide or determine. The act of 1917 does not provide for or contemplate an appeal. We think it should be held that an appeal did not lie, that the action of the board in granting Penney's demand was not the "allowance of a claim" within the meaning of G. S. 1913, § 674. In regard to the suggestion that the board's action is final if no appeal lies, we think this is not so. We think the constitutionality of the act of 1917 may be tested in a proceeding brought to compel or enjoin payment.

Judgment affirmed.

JOSEPH PORTEN v. NELS P. PETERSON AND OTHERS.1

January 11, 1918.

No. 20,578.

Vendor and purchaser — specific performance — form of judgment.

1. The plaintiff as vendee and the defendant as vendor entered into an oral contract for the purchase and sale of real property. The plaintiff took possession and made such part performance that the contract was 1Reported in 166 N. W. 183.



taken out of the statute of frauds. He had an equitable interest. Certain instalments of the purchase price were not due. The defendant could not be required to take them in advance of the due date. Therefore the plaintiff, though he had an equitable interest, could not call in the legal title. The defendant repudiated the contract, claimed that the plaintiff had no interest, and that he was the sole owner free of any claim of the plaintiff. In an action for specific performance, praying also general relief, in which the plaintiff necessarily failed for the reason stated, it is held that the court should enter judgment determining the rights of the plaintiff and the defendant in the property, that is, that it should determine and adjudicate the equitable title of the plaintiff resting upon the defendant's legal title.

Same — interest of plaintiff — waiver of payment.

2. The default of the plaintiff in making payments when due did not bar him of his equitable interest in the absence of laches or abandonment, or of forfeiture by the affirmative action of the defendant, and under the evidence none of these was present; and strict payment was waived.

Interest - application of partial payments.

3. The interest rule in case of partial payments requires the application of a payment if it exceeds accrued interest first to the discharge thereof and then to a reduction of principal; and in the event that it is less than accrued interest the former principal continues as the basis for the computation of interest.

Action in the district court for Steele county for specific performance of an oral contract of sale of certain real estate. The answer was a general denial. The case was tried before Childress, J., who made findings and dismissed the action. From the order denying his motion for amended findings and conclusions of law or for a new trial, plaintiff appealed. Reversed.

J. A. & A. W. Sawyer, for appellant. Leach & Leach, for respondents.

DIBELL, C.

This is an action for the specific performance of an oral contract of sale of real estate with a prayer for general relief. There were findings for the defendants and the plaintiff appeals from the order denying his motion for a new trial.

1. The facts as found by the court or conclusively established by the evidence are substantially as follows: In March, 1911, the plaintiff and defendant Nels P. Peterson entered into an oral agreement whereby the defendant was to build a house on a lot in Owatonna and convey to the plaintiff for \$1,500. The plaintiff was to pay \$10 per month commencing with occupancy, which was in April, 1911, and the taxes which the defendant paid from year to year. The principal sum of \$1,500 bore interest at 6 per cent from the date the house was completed. Pursuant to the agreement the plaintiff took possession of the lot in April, 1911, and in reliance upon it built a barn in which he lived until the house was completed and made other substantial improvements upon and about the lot. The defendant completed the house about December 1, 1911, and since that time it has been occupied by the plaintiff as his home. The plaintiff was working for the defendant at the time and from time to time his earnings were credited upon the contract or payments made. Altogether there was credited and paid in the first four years the sum of \$798.30 and most of the payments were considerably in advance of accrual. The taxes paid by defendant amounted to \$107.74.

What the plaintiff did was such part performance that the contract was taken out of the statute of frauds. The plaintiff is entitled to specific performance, but for the fact that all of the monthly payments fixed by the contract are not due. The evidence well justifies a finding that the \$10 per month was the minimum, but that the plaintiff might pay as much more as he chose; and the conduct of the parties in making and taking payments in irregular amounts and at irregular intervals and often largely in advance of what was then due on the stated monthly basis harmonizes with such view; but there is no such finding nor was there a request for one. The defendant cannot be required to accept payments before due. Until due the plaintiff cannot call in the legal title. Nor can specific performance be enforced upon the theory that the defendant was to execute a written contract embodying the terms of the sale and providing for a warranty deed. The plaintiff testifies that this was the agreement, but the defendant denies it, and there is no finding.

A contract in terms such as are found by the court puts in the vendee an equitable title and leaves in the vendor the legal title as security for the unpaid instalments of the purchase price. See Shraiberg v. Hanson, 138 Minn. 80, 163 N. W. 1032, and cases cited. Prior to the commencement of this action the defendant repudiated the contract. In his answer he denies that one was made. The question is whether the plaintiff, being in possession and being entitled to retain possession, but being unable to maintain specific performance because all the payments are not due, may, when he fails in his action for specific performance, have his equitable title found and adjudicated. We find no case directly in point. The principal question in litigation was whether there was a contract at all. Plaintiff successfully maintained the affirmative. The defendant's contention was that there was no agreement reached; that there was some talk of a sale; that the money paid by the plaintiff was to apply on the purchase price if an agreement was reached and otherwise was to be treated as rent; and that no agreement having been reached the plaintiff has no interest in the property and that he has the unencumbered title. The question whether there was a contract and if so the terms of it was thoroughly litigated. In such a situation we are of the opinion that the court should determine and adjudge the interest of the plaintiff.

It is true that his possession protects him, and that there cannot be an innocent purchaser from the defendant, and that the defendant cannot recover possession. This protection is not complete relief. He should be protected though out of possession and his interest should not be left uncertain. The contract as found by the court contemplates the delay of full performance for many years. The defendant denies it altogether. The facts are less susceptible of proof as the years pass. In the meantime neither party can know of a certainty what his rights are. If the court is unable to quiet this dispute at the suit of the plaintiff until by lapse of time he is entitled to specific performance, the uncertainty continues unless the defendant chooses to litigate. This ought not to be. The right to specific performance of a partly performed oral contract is an equitable interest in land. Benjamin v. Wilson, 34 Minn. 517, 26 N. W. 725. Under our statute an equitable owner may maintain an action to determine adverse claims. 2 Dunnell, Minn.

Dig. & 1916 Supp. § 8043. It is not to be doubted that under a statute like ours the vendee in a contract of sale may maintain an action against a third person to determine adverse claims. Coel v. Glos, 232 Ill. 142, 83 N. E. 529, 15 L.R.A.(N.S.) 413. This is not the precise situation here, for the defendant concededly has the legal title and under him the plaintiff claims. The situation is very much like one where the owner of an equitable title, whose interest is denied by the owner of the legal title, is permitted to take a judgment impressing the legal title with a trust in favor of the equitable title; and that this may be done has been held even where the statutory action to determine adverse claims does not lie in favor of an equitable title. Donohoe v. Rogers, 168 Cal. 700, 144 Pac. 958.

That the evidence to show the contract is now available and later may not be is not without practical significance upon the propriety of a present adjudication. In Slingerland v. Slingerland, 109 Minn. 407, 124 N. W. 19, Mr. Justice O'Brien used this language: "In addition it would seem that now, while the parties to the instrument are alive and capable of testifying fully to the facts, is the appropriate time for the adjustment of this controversy." This was said in an action by a wife, having an inchoate right of dower which might never vest, to have determined the validity of an antenuptial agreement which, unless the action were sustained, could only be determined when upon the death of the husband the inchoate dower interest became vested. There as here the only effect of the decree was to determine the right.

Under the circumstances stated we are satisfied to hold that the plaintiff is entitled to an adjudication of his equitable title which rests upon the legal title of the defendant.

2. The denial of relief to the plaintiff was placed upon the ground, that he had not performed the conditions of his contract. The plaintiff is in default. The precise amount of his default is not material on this appeal. Time is not of the essence of the contract, and a mere default, in the absence of laches or abandonment, and in the absence of a forfeiture or determination of his rights by affirmative action on the part of the defendant, does not result in the loss of his equitable interest. He might through laches lose the right to enforce his contract. Enkema v. McIntyre, 136 Minn. 293, 161 N. W. 587, and cases cited.

He might lose his equitable interest by abandonment. Mathwig v. Ostrand, 132 Minn. 346, 157 N. W. 589, and cases cited. There was no laches nor abandonment nor forfeiture. And all these questions aside, if there was ever a waiver of payments on due dates by taking them in advance and at irregular intervals, here was one. Tingue v. Patch, 93 Minn. 437, 101 N. W. 792.

3. There is a dispute as to the status of the account between the parties. In view of what is said in the preceding paragraph it is not important on this appeal. Since a restatement of the account is necessary it is proper to note that the interest rule, in case of partial payments, requires the application of payments first to a discharge of accrued interest if it be sufficient for such purpose and then to a reduction of principal; and if it is less than the accrued interest the old principal continues as the basis for computation. Betcher v. Hodgman, 63 Minn. 30, 65 N. W. 96, 56 Am. St. 447; Corrigan v. Foot, 126 Minn. 531, 148 N. W. 98; Lundquist v. Peterson, 134 Minn. 279, 158 N. W. 426, 159 N. W. 569. The trial court did not accurately follow this rule.

There is no need of further evidence unless to bring the account to date. There should be a restatement of the account. The findings and conclusions should be amended so as to adjudicate the rights of the parties in the property and determine the payments made and amount due. Then the rights of the parties are fully guarded by the judgment.

Order reversed.

ALFRED L. THWING v. H. M. McDONALD AND OTHERS.1

January 11, 1918.

Nos. 20,590, 20,682.

Appeal and error — necessary parties not served with notice of appeal.

1. The notice of appeal in this case was served upon plaintiff and the receiver of the defendant corporation, but not upon minority stockholders thereof who were parties defendant. The interests of these defendants in relation to the subject of the appeal are in direct conflict with a re-

¹Reported in 165 N. W. 1065.

versal or modification of the judgment appealed from. The judgment appealed from is indivisible, and must be affirmed, reversed or modified as to all the parties to the action. The appeal must therefore be dismissed.

Corporation — receiver — dismissal of appeal.

2. The trial court was not without jurisdiction, by reason of the former decision in this case, to make the orders described in the opinion. As to order No. 2 the appeal is dismissed on the ground stated for dismissing the appeal from the judgment. No reversible error appears in making the other orders appealed from.

After the former appeal reported in 134 Minn. 148, 156 N. W. 780, 158 N. W. 820, the motion of defendant McDonald to amend the conclusions of law and judgment was denied. Upon the application of plaintiff and the receivers of the Minowa Company the conclusions of law, order for judgment and judgment were amended, Stanton, J. Upon the application of the receivers the court (1) fixed a time and place for hearing the claims filed against defendant company; (2) authorized the receivers to join with the minority stockholders of defendant company in making and delivering or tendering to defendant McDonald an assignment of their interest and claim and of that of defendant company in a certain sum of \$1,578.70 on deposit to apply on dividends thereafter accruing to said McDonald from said receivers, and to begin certain actions to quiet title; (3) authorized the receivers to deliver to the Duluth, Missabe & Northern Railway Company a license affecting defendant company's interest in certain land; and (4) directed the receivers to pay Alfred L. Thwing his expenses and disbursements in this action.

Defendant McDonald appealed from the amended decree and from the 4 orders enumerated above. Appeal from decree and from order No. 2 dismissed. Affirmed as to the other orders.

Mohn & Mohn and Harris Richardson, for appellant.

Thwing & Rossman and Alfred L. Thwing, for respondents.

Bunn, J.

After the order of this court on the former appeal in this case, plaintiff moved the trial court for amended conclusions of law in accordance with our decision. Thwing v. McDonald, 134 Minn. 148, 156 N. W. 780,

158 N. W. 820, 159 N. W. 564. Defendant McDonald also moved for amended conclusions. Plaintiff's motion was granted, defendant's denied. Judgment was entered on the amended decision, and defendant McDonald appeals therefrom to this court. He also appeals from four orders made in the proceeding after the judgment was entered.

1. Plaintiff moved to dismiss the appeals. The ground of the motion to dismiss the appeal from the judgment, and the chief ground of the motion to dismiss the appeal as to the orders, is the failure of appellant McDonald to serve notice of appeal upon all of the adverse parties. The notice was directed to and served upon plaintiff, and upon the receivers of the Minowa Company, but no attempt was made to serve the notice upon any of the four minority stockholders, parties defendant in the action. Two of these, defendants Sanderson and Tyndall, appeared and participated in the trial of the action. Each of the defendant stockholders has a direct interest in having the judgment stand. On the former appeal the necessity of serving on these stockholders was recognized, and an argument is attempted to be made out of the fact that they did not file a brief on the former appeal, apparently trusting their interests to the attorney for plaintiff. We see no merit in this argument. Nor can we hold that the attorney for plaintiff represented these defendants. The record does not bear out the contention in this regard. As to the judgment, it is manifest that the question raised by the appeal, that is, whether the amended judgment conforms to the directions of this court on the former appeal, is not a question in which defendant Mc-Donald and plaintiff alone are interested, but is one in the decision of which the defendants not served are equally interested with plaintiff. They are plainly parties adverse to the appellant, and are directly interested in having the judgment stand. There was no difficulty in serving these stockholders. They all reside within the state, two in Itasca county, two in Hennepin county. It is impossible to see why the case is not within the rule of Frost v. St. Paul B. & Inv. Co. 57 Minn. 325, 59 N. W. 308; Oswald v. St. Paul Globe Pub. Co. 60 Minn. 82, 61 N. W. 902; Lambert v. Scandinavian Am. Bank, 66 Minn. 185, 68 N. W. 834; Kells v. Nelson-Tenney Lumber Co. 74 Minn. 8, 76 N. W. 790. These cases hold that the notice of appeal must be served on each adverse party as to whom it is sought to review, in this court, any order or judgment, though he did not appear in the proceeding or action in the district court. Where the order appealed from is indivisible, and must be affirmed, modified or reversed as to all parties to the action or proceeding, the appeal must be dismissed if they are not all made parties to the appeal. Kells v. Nelson-Tenney Lumber Co. supra. The judgment in the case at bar is indivisible and cannot be affirmed, modified or reversed as to plaintiff, without the same action as to the other minority stockholders, defendants in the action.

Appellant relies on Davis v. Swedish-American Nat. Bank, 78 Minn. 408, 80 N. W. 953, 81 N. W. 210, 79 Am. St. 400. The facts in the present case do not bring it within the rule of the case relied on. Rong v. Haller, 106 Minn. 454, 119 N. W. 405, is not in point. We are obliged to grant the motion to dismiss the appeal from the judgment.

2. Each of the four orders appealed from was made after the judgment was entered. We will consider each order by itself with reference to the motion to dismiss the appeal, and, where necessary, on the merits.

Order No. 1, made July 17, 1917, on application of the receivers, fixed September 20, 1917, as the time for hearing on claims against the Minowa Company, and provided that all such claims be filed within 2 months. It can hardly be said that the defendant stockholders are interested in this order adversely to the appellant. The motion to dismiss the appeal as to this order is denied. The only point made against the order is made against the others, and is clearly untenable. It is contended that the court had no right, under our decision on the former appeal, to continue the receivership, but should have discharged the receivers and turned the affairs of the corporation over to its directors. There is nothing in the former decision that forbids the court below continuing the receivership for a time, if deemed necessary or advisable for the purpose of protecting the minority stockholders. The order was within the power of the court and must be affirmed.

Order No. 2 authorized the receivers to join with the minority stock-holders in making and delivering or tendering to defendant McDonald an assignment of all their claim, and all claims of the Minowa Company, in and to the sum of \$1,578.70, "heretofore delivered by the Rogers Iron Mining Company to the Northern National Bank of Duluth, as depository, by order of the district court of St. Louis county, and that the

delivery or tender of such assignment may and shall be equivalent to a delivery or payment to said McDonald of the amount thereof, to apply on dividends hereafter accruing from said receivers and said McDonald, or those claiming under him." The order also directed the receivers to forthwith commence actions in the proper court or courts to quiet the title of the Minowa Company and the receivers to its property as against the adverse claims of the defendant McDonald and other adverse claimants, and authorized the receivers to pay the attorneys who should handle the prosecution of the action or actions reasonable compensation out of the funds of the Minowa Company, and to charge the amount thereof against the stock of defendant McDonald, offsetting the same against dividends on said stock.

It is clear that the minority stockholders are, as to the appeal from this order, parties adverse to the appellant. They have a direct interest in having the order stand. For the reasons stated in considering the appeal from the judgment, the appeal as to order No. 2 must be dismissed.

Order No. 3 authorized and directed the receivers to execute and deliver to and with the Duluth, Missabe & Northern Railway Company, a certain instrument of license affecting the Minowa Company's interest in certain land described. The Oliver Iron Mining Company was interested in the land as lessee. We do not see that the interests of the minority stockholders in this order are adverse to those of appellant. Another ground urged for a dismissal of the appeal as to this order is the failure to make the railway company or the mining company parties to the appeal. We do not think it is made to appear that their interests are adverse. The motion to dismiss the appeal will be denied.

We see nothing in the argument against this order that calls for a reversal thereof. The objection to the jurisdiction of the court is the same as that considered under order No. 1, and is not sustained. It does not appear, as argued, that this order authorizes the receivers to give away the property of the Minowa Company, or that it may result in long litigation. The order must be affirmed.

Order No. 4 directs the receivers to pay to plaintiff's attorney from the funds of the Minowa Company the amount of plaintiff's disbursements on the former appeal, and the amount of the judgment for costs taxed against him on that appeal. The motion to dismiss the appeal as to this

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order is denied. We are of the opinion that the order may be sustained on the theory that plaintiff's suit was in the interest of the corporation. If the corporation had been the actual plaintiff, it would not be material that its payment of disbursements affected the interests of the appellant as a stockholder.

The appeal from the judgment is dismissed. The appeal from the orders is dismissed as to order No. 2. The other orders appealed from are affirmed.

STATE v. SECURITY NATIONAL BANK OF MINNEAPOLIS.1

January 11, 1918.

No. 20,601.

Taxation — state levy on shareholders in national bank. .

1. The state cannot tax a national bank upon its capital, but may tax its shareholders upon their stock in the bank, and may require the bank to apply any earnings distributable to its shareholders in payment of such tax.

Same.

2. Sections 2018 and 2021, G. S. 1913, impose a tax upon the stock of the shareholders and not upon the property of the bank.

Same - sale of assets by national bank.

3. Where a national bank sold and transferred all its property and assets before May 1, but retained the proceeds thereof until May 15 and distributed them to its shareholders on that date, the stock of the shareholders represented their interest in such proceeds on May 1 and is taxable therefor.

Same — levy of tax after distribution of assets to shareholders.

4. Defendant bank went out of business, and in May distributed all its property and assets to its shareholders. In the following October an assessment was made upon the stock of the shareholders, and pursuant thereto the tax in controversy was levied. As defendant had no funds of its shareholders in its possession at any time after the tax was levied, it cannot be required to pay such tax.

1Reported in 165 N. W. 1067.

In August, 1916, defendant bank was cited to appear before the district court for Hennepin county and show cause why it should not pay the sum of \$68,816, taxes for the year 1915 upon its personal property which were delinquent and unpaid. The answer set up that on March 27, 1915, defendant bargained and sold all its assets of every description to the First National Bank of Minneapolis, which on that day were accepted and taken into the exclusive possession of the latter bank; that prior to that sale defendant had fully paid all taxes of every nature levied against it and its stockholders by the state of Minnesota or by any of its municipal subdivisions, and set out the proceedings mentioned in the opinion by which the sale was authorized and consummated. The answer also alleged that any judgment against defendant upon the pretended assessment of 1915 would be in violation of the express provisions of the statutes in reference to the taxation of national banks, of the Federal statutes in reference to the taxation of national banks, and of the Federal Constitution. The matter was heard before Hale, J., who made findings and ordered judgment for the amount demanded. Defendant's motion for amended findings was granted in part. From an order denying its motion for a new trial, defendant appealed. Reversed.

Louis K. Hull and Lancaster, Simpson & Purdy, for appellants.

The assessment and levy of tax against the bank is void upon its face and in excess of the power conferred upon the state by U. S. R. S. § 5219. Smith v. Webb, 11 Minn. 378 (500). Owensboro Nat. Bank v. City of Owensboro, 173 U. S. 664, 19 Sup. Ct. 537, 43 L. ed. 850. In Iowa the supreme court held that the levy of a tax was in fact upon the shares of stock, although in the name of the bank, and not upon the property of the bank. The United States Supreme Court held precisely the opposite. Home Savings Bank v. City of Des Moines, 205 U. S. 503, 27 Sup. Ct. 571, 51 L. ed. 901. The court said (p. 519): "The two kinds of taxes are not equivalent in law, because the state has the power to levy one and has not the power to levy the other. The question here is one of power and not of economics." This language in regard to the construction of the Iowa statute is particularly pertinent to the construction to be put on section 2018, G. S. 1913. National State Bank v. Young, 25 Iowa, 311; Hershire v. First Nat.

Bank, 35 Iowa, 272; Farmers' and Traders' Nat. Bank v. Hoffmann, 93 Iowa, 119; Merchants' State Bank v. McHenry County, 31 N. D. 108, 153 N. W. 386; First Nat. Bank v. Fisher, 45 Kan. 726, 26 Pac. 482; Miller v. First Nat. Bank, 46 Oh. St. 424, 21 N. E. 860; State v. First Nat. Bank, 180 Mo. 717, 79 S. W. 943.

Prior to May 1, 1915, defendant had ceased to be a bank and had converted all its assets and good will into cash and actually appropriated the same to the shareholders in full liquidation of their rights as such shareholders. It sold and transferred on March 27, 1915, all of its tangible assets, and also its good will for the sum of five million dollars and received in payment therefor that sum in cash, the full amount thereof having been paid to it in two instalments, one on March 29, 1915, and the balance on April 1, 1915. All of its liabilities were assumed by the First National Bank. Prior to May 1, 1915, every stockholder of the defendant had actually executed and delivered to the defendant an approval, ratification and confirmation and appropriation of his proportionate share of that five million dollars and his subscription to the proposed increased capital stock of the First National Bank, and in addition thereto, had indorsed in blank his certificates of stock and surrendered the same to the bank for cancelation. The stockholders, therefore, of the defendant bank had done everything possible for them to do prior to May 1, 1915, to effectuate an actual and complete liquidation of the bank. So far, therefore, as this sale, transfer and delivery were concerned, no further act on the part of the stockholder was at all necessary. Both title and possession were complete in the First National Bank before May 1, 1915.

The state clearly could have no "lien" on the assets of the bank, unless the statute created it, and the only statutory lien for taxes is that of section 2180, G. S. 1913, "from and after the time the tax books are received by the county treasurer." In this case it is stipulated that the tax books were not in fact delivered to or received by the county treasurer until January 3, 1916.

John M. Rees, County Attorney, and Frank J. Williams, Assistant County Attorney, for respondent.

The law is constitutional and the assessment is valid. National Bank

v. Com. 9 Wall. 363; Aberdeen Bank v. Chehalis County, 166 U. S. 440, 17 Sup. Ct. 629, 41 L. ed. 1069. The cases of Owensboro Nat. Bank v. City of Owensboro, 173 U. S. 664, 19 Sup. Ct. 537, 43 L. ed. 850, and Home Savings Bank v. City of Des Moines, 205 U. S. 503, 27 Sup. Ct. 571, 51 L. ed. 901, relied on by defendant, do not in any manner attempt to overrule the cases of National Bank v. Com. and Aberdeen Bank v. Chehalis County.

It is immaterial whether the bank was a going concern on May 1, 1915. The bank was not liquidated on May 1, 1915. This is a tax against the stockholders on account of shares of stock owned by them in a corporation. The only pertinent inquiry in this connection is, did the stockholders, as such, have any interest in the defendant corporation on May 1? If any distribution of its assets among its stockholders is shown at all by the evidence, it could not have been prior to May 15, 1915.

By reason of the process of the statutory garnishment contained in section 2021, G. S. 1913, the earnings of the bank, in such an amount "as may be necessary" were garnished for the purpose of collecting the tax. This garnishment affixes itself as of the date fixed by law for the assessment of personal property, to wit: May first of each year, and continues until the tax is paid. If the bank disburses the funds so garnisheed, without indemnifying itself against the payment of the tax, it cannot be heard to complain if compelled to pay the tax out of its own funds; for in such a case it is through its own fault a negligence that it is damnified. The ordinary process for the collection of a tax, to wit, judgment and execution may be put in operation against the bank.

The bank still has control, through its liquidating committee, over the five million dollars assets which it owned on May 4, for the purpose of paying the debts of the corporation. The liquidation committee appointed by the bank on May 4, 1915, has never met (Finding No. XII, fol. 67). Money earned by a corporation remains the property of the corporation and does not become the property of the stockholders unless and until it is distributed among them by the corporation. 1 Thompson, Corp. (2d ed.) § 805; 3 Clark and Marshall, Private Corp. §§ 627 and 644; Gibbons v. Mahon, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. ed. 525.

Lancaster, Simpson & Purdy, for appellants.

IN REPLY.

In National Bank v. Com. 9 Wall. 363, the only questions involved were: (1) Was the assessment in substance, if not in form, upon the shares of stock rather than upon the capital stock of the bank, as claimed by the bank's counsel, and the court squarely held that it was; and (2) was the bank entitled to deduct from the assessment on the shares of stock belonging to the stockholders government bonds held by it, and the court held that it was not. In Aberdeen Bank v. Chehalis County, 166 U. S. 440, 17 Sup. Ct. 629, 41 L. ed. 1069, no question whatever was made but that the bank had in its possession and under its control funds belonging to the stockholders severally, from which to pay the tax as levied. In Charleston Nat. Bank v. Melton (C. C.) 171 Fed. 743, the court explicitly eliminates from the case the question which is so prominent in this, viz., whether the bank had sufficient funds of the stockholders to pay all taxes against the shares of stock.

Counsel for the state are in this dilemma. If they contend that the tax is properly assessable against the bank, not as agent or trustee of the shareholders, then the assessment is absolutely void, being in excess of the power delegated by Congress to the states to tax the shares of national banks against the shareholders, as other personal property belonging to such shareholders; or, if they contend that the assessment is in form and substance upon the shares of stock and against the shareholders, but that the bank is absolutely liable, regardless of whether it has in its hands any funds, such as is prescribed by section 2021, G. S. 1913, from which to reimburse itself, then the same is void.

The bank was not only out of business and no longer a "going concern," but the stockholders themselves had surrendered absolutely their certificates for cancelation and accepted in place thereof their proportionate shares of the five million dollar fund and appropriated the same to the payment of their subscriptions for stock in the First National Bank. The course adopted accomplished precisely the same object as if defendant had executed to its stockholders after they had surrendered the certificates of stock and executed their combination proxies, checks for each stockholder's proportionate share in the five million dollar fund, and each stockholder had indorsed his check and left it to be delivered to the

First National Bank in payment of his new subscription. There was in fact prior to May 1 a liquidation agreed upon and approved by the individual action of every stockholder and an appropriation of the assets of defendant bank to their use and benefit.

The state concedes defendant bank was not a going concern after March 27 and the court found (P. B. pp. 20, 68) that it had never done any business, banking or otherwise, or received any income after that day. This makes it absolutely certain defendant never had in its hands any annual earnings accruing after that day.

TAYLOR, C.

This is a proceeding to collect from the Security National Bank of the city of Minneapolis the amount of a personal property tax upon the shares of its stock. The bank interposed as a defense that it had sold and transferred all its property of every kind and nature and had distributed the proceeds thereof to its shareholders and had gone out of business before the tax accrued. The trial court directed judgment for the amount of the tax and the bank appealed from an order denying a new trial.

The Security National Bank, originally organized as a state bank, was incorporated as a national bank in 1907, with a capital stock of one million dollars, and conducted a general banking business until it sold and transferred all its business and assets to the First National Bank of Minneapolis in 1915. In the early part of 1915, an arrangement was made to combine and consolidate the two banks into one. To accomplish this purpose the board of directors of the First National Bank, on March 19, 1915, unanimously adopted a resolution to purchase all the assets and good will of the Security National Bank, subject to all its liabilities and obligations, for the sum of five million dollars; to increase the capital stock of the First National Bank from \$2,500,000 to \$5,000,000; to set aside 20,000 shares of this increase in capital stock for sale to the shareholders of the Security National Bank at \$250 per share and in the proportion of two shares of this stock for each share of the stock of the Security National Bank held by them; and directing the executive officers to call a meeting of the shareholders of the First National Bank for May 4, 1915, to consider and vote upon the several propositions. The resolution contained a provision by which it did not become effective unless the shareholders of the First National Bank voted the proposed increase of its capital stock, and the shareholders of the Security National Bank subscribed for 20,000 shares of such stock upon the prescribed terms.

On the same day, March 19, 1915, the shareholders of the Security National Bank held an adjourned annual meeting at which more than two-thirds of all its capital stock was represented. These shareholders unanimously adopted a resolution in which the resolution adopted by the board of directors of the First National Bank was set forth in full, and which authorized and directed the officers of the Security National Bank to make the proposed sale upon the proposed terms, and to do all acts necessary or proper to carry it into effect. On the same day, March 19, 1915, the board of directors of the Security National Bank adopted a resolution in which the resolution adopted by the shareholders was set forth in full, and which authorized and directed the executive officers to make the proposed sale and to do all acts necessary or advisable to carry it into effect, and to call a meeting of the shareholders for May 4, 1915, for the purpose of voting upon placing the bank in liquidation and upon any matters necessary to carry out the propositions contained in the resolutions. To insure the consummation of the project, the individual shareholders of the Security National Bank executed instruments (all of the same tenor and too lengthy to quote), in which each shareholder for himself assented to and approved all the propositions contained in the several resolutions, and the proposition to liquidate the Security National Bank, and subscribed for two shares of the proposed increase in the capital stock of the First National Bank for each share held by him in the Security National Bank; and in which he also authorized the Security National Bank and its executive officers to accept the certificates for such stock when ready for delivery and to pay therefor out of any funds in its or their hands belonging to him from the liquidation of the Security National Bank; and in which he also appointed George K. Belden or L. L. Dodge or Frank K. Pratt, as his proxy, to vote his stock in favor of these several propositions at the shareholders' meeting to be held on May 4, 1915. Before March 27, 1915, nearly all the shareholders of the Security National Bank executed one of these instruments and delivered it, together with his certificates of stock indorsed in blank, to the attorney of the bank, and the few who had not done so before that date did so before the first day of May, 1915. Before March 27, 1915, individual shareholders of the First National Bank representing more than two-thirds of the capital stock of that bank, executed and delivered instruments, all of the same tenor, in which all such shareholders assented to and approved all the propositions embraced in the several resolutions, waived his preference right to purchase any of the shares of the proposed increase in the capital stock allotted to the shareholders of the Security National Bank, and appointed George P. Flannery, David F. Simpson and Dana L. Case as his proxies to vote his stock in favor of the several propositions at the shareholders' meeting to be held on May 4, 1915.

After a sufficient number of the shareholders of each bank had assented to the several propositions and directed their respective representatives to vote their stock in favor of the same to insure the approval and carrying out of such propositions, and on March 27, 1915, the Security National Bank transferred and delivered all its property and assets of every kind and nature to the First National Bank and quit business entirely. Shortly afterwards the First National Bank entered upon its books a credit of five million dollars to the "Security National Bank in liquidation." On May 4, 1915, the shareholders of the First National Bank duly voted to increase its capital stock to five million dollars, and ratified and confirmed the resolution of March 19 and all things done thereunder, and the shareholders of the Security National Bank ratified and approved the resolutions of March 19, and voted that the Security National Bank be placed in voluntary liquidation and appointed a liquidating committee. On May 14, 1915, the comptroller of the currency approved the increase of the capital stock of the First National Bank, and on the following day, May 15, 20,000 shares of such stock were issued and delivered to the shareholders of the Security National Bank pursuant to their subscriptions therefor made as hereinbefore stated. The purchase price for these shares exactly equalled the five million dollars to be paid for the property of the Security National Bank, and by direction of the officers of that bank the five million dollars credited to the "Security National Bank in liquidation" as above stated was applied as payment for such shares, and was credited in proper amounts to the respective shareholders, to whom such shares were issued, as received in payment for such shares. At the same time, the stock certificates of the Security National Bank, indorsed in blank by the respective holders thereof, were delivered to the First National Bank and marked "canceled."

The Security National Bank made no return of its capital stock for taxation in the year 1915; but the five million dollars which on May 1, 1915, stood on the books of the First National Bank as a credit to the "Security National Bank in liquidation," was assessed as money and credits and, as a matter of convenience and by agreement with the assessor, this assessment was placed against the First National Bank. The tax upon this assessment in the sum of \$15,000 was subsequently paid. The rate upon money and credits is much less than the rate upon capital stock and in October, 1915, the assessment of the capital stock upon which the tax in controversy is based was made by direction of the State Tax Commission.

1. Defendant contends that the tax in controversy is "in form and substance upon the capital stock of the bank and against the bank, and not upon the shares of stock and against the shareholders," and is void for that reason.

That a state cannot tax a national bank upon its capital, but may tax its shareholders upon their stock in the bank is conceded and is too well settled to require discussion. It is also settled that the state, by statute, may require the bank to pay the tax upon the stock of its shareholders out of any funds in its possession available for that purpose, that such statutes make the bank a sort of equitable or statutory garnishee and may provide an appropriate procedure for enforcing payment from it. Nat. Bank v. Commonwealth, 9 Wall. [76 U. S.] 353, 19 L. ed. 701; First Nat. Bank v. Chehalis County, 166 U. S. 440, 17 Sup. Ct. 629, 41 L. ed. 1069; Merchants and M. Bank v. Pennsylvania, 167 U. S. 461, 17 Sup. Ct. 829, 42 L. ed. 236.

The present question is whether our statute imposes the tax upon the bank, or upon the interest of the shareholders in the bank, upon the capital of the bank, or upon the stock of the shareholders.

The statute provides that the stock of every bank shall be assessed in the name of the bank; that the proper officer shall list all shares of the bank for assessment; that, "to aid the assessor in determining the value of such shares of stock, the accounting officer of every such bank shall furnish to the assessor a sworn statement showing the amount and number of the shares of the capital stock, the amount of its surplus or reserve fund and amount of its legally authorized investments in real estate;" that "the assessor shall deduct the amount of investments in real estate from the aggregate amount of such capital and surplus fund, and the remainder shall be taken as a basis for the valuation of such shares in the hands of the stockholders;" and that to secure the payment of taxes upon bank stock every bank shall, "before declaring any dividend, deduct from the annual earnings of the bank such amount as may be necessary to pay any taxes levied upon the shares of the stock, and such shall pay the taxes, and shall be authorized to charge the amount of such taxes paid to the expense account of such bank." G. S. 1913, §§ 2018, 2021. Having in mind that the tax is valid if upon the stock as representing the interest of the shareholders and therefore in substance against the shareholders, but is void if upon the property of the bank and therefore in substance against the bank; and that a statute should not be so construed as to render it void, if it be fairly and reasonably susceptible of a construction which will render it valid and accomplish the purpose intended by it, we hold that the statute in question imposes the tax upon the stock as the property of the shareholders and as representing their interest in the bank, and that the tax is valid. State v. Barnesville Nat. Bank, 134 Minn. 315, 159 N. W. 754.

2. Defendant further contends that it "was not a going concern on May 1, 1915, and that its stockholders were not subject to taxation on the shares of stock for the year 1915."

The statute provides that "personal property shall be listed and assessed annually with reference to its value on May 1." Consequently the present question is whether this stock had value on May 1. That it did we think is too clear to require extended discussion. True defendant quit business on March 27 and turned over all its assets to the First National Bank on that date, but this transaction was not completed, and under the resolutions adopted by the banks, could not be completed until after the meeting of the shareholders of the First National Bank on May 4. But passing this fact, the stock represented the interest of the shareholders in the property of defendant as well after defendant ceased to

be a going concern as before, and whether such property consisted of the assets sold and transferred to the First National Bank or of the five million dollars agreed to be paid for such assets by that bank. The stock represented the interest of the shareholders in the assets of defendant until the assets were disposed of, and thereafter represented the interest of the shareholders in the proceeds of the assets until such proceeds were distributed to the shareholders, and this did not take place until May 15. The interest of its shareholders in the property of defendant did not terminate until they accepted the shares of the First National Bank in payment of the distributive share to which their stock in defendant would otherwise have entitled them at the liquidation of defendant.

3. Defendant further contends that, even if the stock of its shareholders was taxable in 1915, the tax cannot be enforced against defendant, for the reason that defendant has never had any funds belonging to its shareholders since the tax was levied.

The tax is against the shareholders and the statute merely makes use of the bank as a convenient instrumentality for collecting it from the shareholders. Although the stock of a bank represents the interest of the shareholders in the capital as well as in the earnings of the bank, the state cannot require a national bank to impair its capital by paying the tax of its shareholders. Our statute recognizes the limited power of the state, and simply requires that the tax upon the stock be paid out of the earnings distributable to the holders of such stock. Defendant was in business and made earnings for nearly three months in 1915. It then closed its doors and went into voluntary liquidation, and thereafter each and every shareholder surrendered his stock and received and accepted his proportion of the assets by applying it in payment for stock in the First National Bank. By this transaction, which was completed on May 15, 1915, the entire assets of defendant were in effect distributed to its shareholders, and since that date defendant has had no property of any kind. By this distribution, the earnings then on hand were in effect paid to the shareholders as a dividend, and the real question is whether the statutes imposed upon defendant the duty to retain sufficient of these funds to pay the tax in controversy.

A tax is not a lien upon property except as made so by statute. State

v. Bellin, 79 Minn. 131, 81 N. W. 763; Gould v. City of St. Paul, 120 Minn. 172, 139 N. W. 293. The statute provides:

"The taxes upon personal property shall be a lien upon the personal property of the person assessed from and after the time the tax books are received by the county treasurer." G. S. 1913, § 2180. As the tax books embracing the tax in controversy were not delivered to the county treasurer until long after defendant had disposed of all its property, the tax never attached as a lien upon such property, even assuming that this statute gives a lien upon the property of the bank for the tax of its shareholders.

Counsel for the state insists, however, that the provision that every bank shall, before declaring any dividend, deduct from the annual earnings of the bank such amount as may be necessary to pay any taxes levied upon the shares of stock, imposed upon defendant the duty to withhold a sufficient amount from the funds distributed in May to pay the tax in controversy. The bank is required to retain sufficient of its earnings "to pay any taxes levied upon the shares of stock." The term "levied" as used in our tax laws has different meanings in different parts of the laws. It sometimes refers to the legislative act of imposing the tax, and sometimes to the administrative act of making the assessment, and extending the tax upon the tax lists. State v. Lakeside Land Co. 71 Minn. 283, 73 N. W. 970. Here the term plainly refers to the administrative act, and the tax was not "levied upon the shares of the stock," until it was entered upon the tax lists. The term "levied" is in the past tense and denotes past time-something already done; and the language used cannot fairly be construed as requiring the bank to withhold from its shareholders sufficient funds to pay whatever tax might be levied at any time in the future. If the legislature had intended to require banks to retain sufficient funds to pay a tax of unknown amount to be imposed in the future, they would have used language plainly indicating that such was their intention. When a bank pays a dividend it knows, or can readily ascertain, the amount of any tax upon the shares of its stock then entered upon the tax lists, and must make provision for the payment of such tax, but the statute does not require it to provide at that time for a tax neither due nor levied and the amount of which cannot then be ascertained. State v. Barnesville Nat. Bank, 134 Minn. 315, 159 N. W. 754.

As defendant has had no funds belonging to its shareholders at any time after the tax was levied, it follows that it cannot be required to pay this tax of its shareholders and that this proceeding cannot be sustained. Order reversed.

KATHERINE JORDAN PEAVEY v. FREDERICK B. WELLS AND OTHERS.¹

January 11, 1918.

No. 20,602.

Corporation - sale of stock by shareholders.

1. Plaintiff's testate sold to two of defendants certain stock in a corporation in which all were actively engaged, taking in payment a note secured by the stock as collateral, payable only out of dividends on the stock.

Same — action to set aside transfer — constructive fraud.

2. This action is brought to set aside the transfer, not on the ground of misrepresentation or deceit, but of constructive fraud. The principle of law invoked is, that he who bargains in a matter of advantage with a person placing confidence in him, cannot be permitted to get the better of the bargain.

Same - principle inapplicable.

3. The facts do not bring the case within that principle. Deceased acted understandingly and with free volition. His acts bound him.

Same - no presumption of fraud.

4. The nature of the consideration, under the circumstances of the case, raises no presumption of fraud.

Same — action without legal counsel.

5. Failure to secure independent legal advice is not, in itself, ground for avoiding the transaction.

Same - validity not affected by creation of trust,

6. The fact that the transaction also involved the creation of a trust making defendants trustees and deceased a beneficiary, does not affect the validity of the transfer of stock.

¹Reported in 165 N. W. 1063.

After the former appeal reported in 136 Minn. 180, 161 N. W. 508, defendant's motion to strike out the conclusions of law and substitute others was granted, Jelley, J. From the decree entered pursuant to the substituted conclusions of law, plaintiff appealed. Affirmed.

Davis, Severance & Olds and Richard Reid Rogers, for appellant. Lancaster, Simpson & Purdy, for respondents.

HALLAM, J.

1. Plaintiff brings this action to set aside a transfer of 7,000 shares of the capital stock of F. H. Peavey & Company, made in 1907, by George W. Peavey, deceased, to the defendants Heffelfinger and Wells. The stock was transferred at its face value, defendants giving their demand note at 4 per cent interest for the amount, secured by the stock as collateral, subject, however, to the condition that the note and interest are not required to be paid otherwise than from the proceeds of dividends upon the stock. On the trial the district court set the transfer aside on the ground that it was without consideration. This decision was reversed, for the reason that the transfer was an executed one and required no consideration to sustain it. 136 Minn. 180, 161 N. W. 508. The district court then gave judgment for defendants on findings that there was no fraud. Plaintiff appeals and contends that fraud was established and that findings to the contrary are not sustained by the evidence.

To understand the transaction we must take into account some matters of family history. The business of F. H. Peavey & Company was a grain and elevator business in Minneapolis established by Frank H. Peavey. Mr. Peavey had three children. George, plaintiff's husband, was his only son. One daughter married defendant Heffelfinger; the other, defendant Wells. In 1899 Peavey conceived the idea of taking his son and sons-in-law into the business with him by sale to each of a 1-36 interest, taking a note therefor payable out of the earnings of such share.

Seven months later Peavey made his will, and into that he carried this same idea of sale of an interest in the business to be paid for by so-called "dividend notes." In this will he requested that upon his death the surviving partners, that is, his son and sons-in-law, continue the business of the firm for 5 years, and he directed that at the expiration of 5 years a corporation be formed to take over the business and that the executors

sell to his son and to his sons-in-law each ½ of the capital stock of the corporation, taking in payment a note bearing interest at 4 per cent, secured by the stock as collateral, and payable out of the dividends declared and paid on the stock. He further directed that said notes not to excepd \$800,000 be transferred to each of his three children. The above mentioned directions were carried out. Peavey died December 30, 1901. The corporation was organized December 31, 1906. George W. Peavey, Heffelfinger and Wells each subscribed for one million dollars worth of stock, giving notes payable as above described and notes were distributed according to the will. The practical result was that Heffelfinger's note for \$800,000 was transferred to his wife, Wells' note for like amount to his wife and George Peavey's note for like amount was returned to him and canceled, thus giving him this much stock clear of debt. It is part of this stock that is in controversy.

When the corporation was formed George W. Peavey became president, Heffelfinger and Wells vice presidents. The business was transacted largely through a number of subsidiary corporations. The executive offices in these were about equally divided. George Peavey was also a director in the Northwestern National Bank.

Heffelfinger was then 37, Wells 33 and George 29. All had been partners in the business for more than seven years. Each was drawing a salary of \$20,000 a year. Peavey did not devote himself as assiduously to business as did Heffelfinger and Wells. He was addicted to the use of liquor but never drank to such an extent as to incapacitate him for business. "It never seemed to have a hold on him" and "to an outsider it was scarcely perceptible." In the summer of 1907 he decided to quit active business life. In September he became infatuated with a profligate woman, left his wife and went to New York, intending to sail with this woman for South America for an indefinite time. Heffelfinger and Wells became naturally alarmed. The corporation was a large borrower, notes of the corporation for hundreds of thousands of dollars were outstanding indorsed by Peavey, Heffelfinger and Wells. Heffelfinger was in Boston, Wells wired him and he went to New York.

An uncle, Peavey's father's brother, who lived in New York, was called in and both he and Heffelfinger tried to dissuade Peavey from his purpose. To his uncle, George said he was going "to leave Minneapolis" and was "through with the grain business." These parties were together in New York from September 15 to September 19, when the transfer of the stock was made. George also resigned as executor of his father's will, and as administrator of his mother's estate, as officer and director of F. H. Peavey & Company and of 14 subsidiary companies, and transferred his property to Heffelfinger, Wells and the Minneapolis Trust Company as trustees with power to manage and control the same and with authority to pay to his wife, for her support and maintenance, not less than \$10,000 and not more than \$20,000 per annum and to pay the balance to himself.

The issue is narrow. There is no claim of any misrepresentation or deceit. Plaintiff relies on what is called "constructive fraud." The principle of law on which plaintiff relies is, that he who bargains, in a matter of advantage with a person placing trust and confidence in him, is bound to show that a reasonable use has been made of that trust and confidence. Whelan v. Whelan, 3 Cowen, 537; King v. Remington, 36 Minn. 15, 29 N. W. 352; Fischer v. Sperl, 94 Minn. 421, 103 N. W. 502; Shevlin v. Shevlin, 96 Minn. 398, 105 N. W. 257. A multitude of decisions might be cited which restate the rule in varying language. The principle is just and right. Originating in cases involving the conventional relation of trustee and cestui que trust, it has been broadened and extended to every variety of relation in which dominion may be exercised by one person over another (Huguenin v. Baseley, 14 Ves. Jr. 273), and when such a relation does exist, courts of equity will not suffer one party, standing in a situation of which he can avail himself against the other, to get the better of the bargain. 1 Story, Eq. (12th ed.) § 307.

3. The question is, do the facts make a case for the application of this principle? The trial judge found they did not. He found in effect that there was no relation of trust and confidence between Peavey and Heffel-finger and Wells. Had this transaction been consummated while Peavey was at his desk or at his home in Minneapolis, anything like a trust relation existing between these parties would probably not have been claimed. Misplaced confidence or personal domination as of an "elder brother" would probably not have been thought of. We find nothing in the record to suggest that any such relation existed between these parties in any of their prior dealings. He was their equal in business position,

had had "great experience in business for one of his age," and was accustomed to rely on his own judgment.

It is undoubtedly true that at the time of the meeting in New York George Peavey had suffered a tremendous moral lapse. In spite of that, there is no evidence of mental incapacity or that he was anything but He might have consulted his uncle, whom he doubtless trusted, but he simply told him what he had decided. He was not under the influence of liquor nor suffering from its use. The same day he signed the papers he "cut off" all relations with his paramour and asked Heffelfinger to plead for his wife's forgiveness. Three days later he sailed for Europe alone. As soon as he took passage he commenced writing letters to his wife begging her to rejoin him. She did so. Before she did so, however, Heffelfinger and Wells explained to her the transaction, and advised her they were so vitally interested in the matter that she had better consult a disinterested lawyer. She did get the advice of a high class lawyer and told her husband so. After she joined him they spent nearly three years abroad. To the day of his death Peavey remained faithful and lived a sober life. In October, 1910, after the return from abroad, the trust agreement above mentioned was revoked. An agreement was made, signed by Peavey, Heffelfinger and Wells, reciting the sale of the stock and the giving of the note, stipulating that the note be delivered to Peavey and that all payments be made to Peavey direct, or on his order, and that the stock be held by defendant Deaver for the purpose specified in the note. Here was a direct reaffirmance of the New York agreement. Peavey lived two and a half years longer. He at all times understood the nature of the transfer. He never hinted dissatisfaction. He acted throughout with understanding and with free volition. His acts bound him. Shevlin v. Shevlin, 96 Minn. 398, 105 N. W. 257; Ludington v. Patton, 111 Wis. 208, 86 N. W. 571, were very different cases.

4. It is urged that the consideration is so inadequate as to raise a presumption of fraud. Want of consideration may be decisive evidence of fraud where there is great inequality between the contracting parties or a relation of trust and confidence between them. Conant v. Jackson, 16 Vt. 335; Stone v. Moody, 41 Wash. 680, 84 Pac. 617, 85 Pac. 346, 5 L. R. A. (N. S.) 799; Casborne v. Barsham, 2 Beav. 76; Heathcote v.

Paignon, 2 Brown's Ch. 167. In itself, it does not establish fraud "unless it is so gross as to shock the conscience of any man, who heard the terms." Lord Eldon in Gibson v. Jeyes, 6 Ves. Jr. 267, 273. The nature of the alleged consideration in this case was discussed somewhat on the former appeal. 136 Minn. 180, 187, 161 N. W. 508. Whatever may be said of its sufficiency as constituting consideration in point of law, when we take all the facts into account the transaction was not a strange one. The will of Frank H. Peavey contained this significant provision, that, upon the formation of the corporation, "if my son or either of my sons-in-law do not wish to or is incapacitated from making" purchase of his third of the stock of the corporation, "said stock shall be sold to the other two, one-half to each, upon the same terms." That is, George Peavey, in New York, left himself in the same position as he would have been in had he not wished, or not been able, to enter the corporation in the first place.

When he had once availed himself of the right to purchase this stock, he, of course, had all the legal rights which that purchase gave. Yet it probably seemed clear to all of them that it was the desire of Frank H. Peavey that his son and sons-in-law should continue in the business and that this option to them to purchase stock was in furtherance of that desire, that he assumed that if they availed themselves of the option they would identify themselves with the business, and that it was with these things in mind that he gave to his son this option, which he did not give to his daughters. Accordingly, when George Peavey decided to abandon the business to Heffelfinger and Wells, it is not shocking that he should transfer to them the right to acquire this stock in the same manner. This left him in the same position as his sisters, and in the position in which his father planned that he should be if he saw fit not to enter the corporation in the first instance.

5. Much is made of the fact that George W. Peavey had the benefit of no independent legal advice. He had ample opportunity to secure counsel but showed no desire to do so. In the absence of some relation of trust or confidence, this is not of great importance if he understood the legal effect of the transaction. Zimmerman v. Frushour, 108 Md. 115, 69 Atl. 796, 16 L.R.A.(N.S.) 1087, 15 Ann. Cas. 1128. The court found that he did. It seems unlikely that he failed to understand fully.

6. The fact that Peavey signed the trust agreement with the other papers several days before Heffelfinger and Wells signed on their part, does not make the transaction one between trustees and beneficiaries. There was but one transaction. No relations were established until the documents were executed on both sides.

We conclude that the sale of the stock was valid. Judgment affirmed.

LEWISTOWN IRON WORKS v. VULCAN PROCESS COMPANY.1

January 11, 1918.

No. 20,607.

Contract - actions for breach - loss of profits.

1. In an action for breach of contract, profits which would have been realized had the contract been performed, and which had been prevented by its breach, may be recovered where such profits are not open to the objection of uncertainty or of remoteness, or where, from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into.

Same - evidence admissible to prove damages.

2. In an action for breach of contract, where the vendor sold to the vendee a certain welding apparatus for use in its machine repairing business, in a certain county, and, as a part of the contract of sale, agreed to protect the vendor for that county on all such machines sold to it, and not to place any others of the same make in the county, proof of the amount of welding work and the profits derived therefrom done by machines of the same make placed in the county by the vendor, or others liable upon such contract, may be shown and taken into consideration by the jury, in estimating the vendee's damages for the breach.

Same - question for jury.

3. Whether the defendant assumed liability for a breach of contract was for the jury, under the evidence.

¹Reported in 165 N. W. 1071.

Verdict - damages not excessive.

4. It does not appear that the verdict was given under the influence of passion or prejudice, or that it is excessive, and it was supported by the evidence.

Charge to jury - refusal of requests.

5. We find no reversible error in the charge to the jury when considered in its entirety, nor was it error to deny the defendant's requests to charge.

Rulings on evidence.

6. There was no error in the rulings of the court as to the admissibility of evidence sufficient to justify a reversal.

Two actions in the district court for Hennepin county, one to recover \$5,000 and the other to recover \$10,000 for breach of contract. The cases were consolidated and tried together before Jelley, J., and a jury which returned a verdict for \$4,600. Defendant's motion for a new trial was denied. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

McDowell & Fosseen, for appellant.

George S. Grimes and Gordon Grimes, for respondent.

QUINN, J.

Action to recover damages for breach of contract. Plaintiff recovered a verdict. A case was settled. Defendant moved for a new trial, which was denied. Judgment was entered and defendant appealed.

On and prior to April 9, 1913, and for some time thereafter, E. B. Teeple was engaged in business at Minneapolis, under the name of Vulcan Process Company. He had the exclusive sale of a welding plant apparatus manufactured by the Northern Welding Company of the same place. On that day he sold and thereafter delivered one of such plants to plaintiff for use in its business at the city of Lewistown, located in the central part of Fergus county, Montana. As a part of the contract of sale, which was in writing, the vendor agreed to protect plaintiff for that county on all plants sold to it, and not to place any other like make in that county without plaintiff's consent, guaranteeing plaintiff against any infringement of patent, and warranting that the apparatus would do any kind of work to be found in general welding. The plaintiff paid Teeple

\$200 in cash and gave its note for \$560 in settlement for the plant, the title thereto to remain in the seller until the note was paid in full.

In June of that year L. E. Jordan became interested in the business with Teeple. During the summer of 1913, Teeple, Jordan and one J. W. Smith, who was the treasurer of the Northern Welding Company, undertook to incorporate under the name of the Vulcan Process Company, pursuant to the laws of the state of Minnesota, for the purpose of taking over the business of the old Vulcan Process Company. Articles of incorporation were accordingly prepared, signed and acknowledged by these parties, as of July 1, 1913, but were not recorded until September 11, 1913.

It is contended on behalf of the plaintiff, that the articles were signed at the time they bear date; and that at that time a written agreement was entered into between the old Vulcan Company and the proposed corporation, Teeple acting for the old company and J. W. Smith acting for the proposed corporation, whereby the patents, contracts, good will and all other property and assets of the old company were sold and transferred to the proposed corporation; and that, in consideration therefor, the defendant was to pay all the debts, assume all the obligations and perform all the contracts of the old company, including the contract in question; that accordingly all the property of the old company was turned over to, and the business was thereafter conducted in the name and for the defendant; and that after the filing of the articles, the defendant fully ratified and confirmed the agreement and transfer, and thereby became liable on the contract in question.

While the defendant admits that the articles appear, upon their face, to have been signed and acknowledged on July 1, 1913, yet it contends that they were not in fact signed or acknowledged until some time in September of that year, and that the business and property of the old Vulcan Company were not turned over to it until after the filing of the articles in September. Defendant denies that any contract was ever entered into between Teeple and Smith, as contended by the plaintiff, or that defendant ever ratified or confirmed any such contract, or that it ever assumed any liabilities or debts of the old Vulcan Company. There was a sharp conflict in the testimony as to these matters upon the trial. The same was fully submitted to the jury under proper instruc-

tions, and, by the verdict, determined adversely to the contention of the defendant, which, under the evidence, we deem conclusive. Nothing will be accomplished by a resume of the testimony bearing upon these issues, further than to remark that at the first meeting of the stockholders in September, 1913, the secretary was instructed to issue 255 shares of the capital stock of the corporation to Teeple and 80 shares to Jordan, in payment for the business and property of the old Vulcan Company turned over to it on July 1, 1913. Plaintiff claims that the contract between Teeple and Smith was turned over to defendant with the other papers, and defendant denies this contention. The paper was not produced at the trial.

Defendant had possession of the contract and note for \$560 during the fall of 1913, and the amount then owing upon the note was paid to it. In February, 1914, defendant, through a jobber, sold and delivered a welding plant of the same make as plaintiff's to one McHardie, at Buffalo, Fergus county, Montana, for use in that county, without plaintiff's consent. The plaintiff then brought suit for damages against defendant, claiming that the sale was in violation of the terms of the Teeple contract and that the defendant, having assumed the same, was liable for its breach. A trial followed. Plaintiff recovered a verdict which was set aside and a new trial granted. Pending that suit defendant made 7 like sales in Fergus county, and plaintiff brought another action for damages for breach of its contract. The two suits were consolidated and tried as one. Plaintiff recovered a verdict for \$4,600 upon which judgment was entered, and defendant appealed.

Defendant alleges some 38 assignments of error upon this appeal, 14 of which relate to rulings upon the admissibility of evidence, and 18 to the instructions of the court bearing upon profits and losses with reference to the measure of damages. We think the evidence, as well as the instructions in reference to the profits and losses, was proper. Nor is there any force in the objection that no proper foundation was laid for the testimony of the witnesses testifying as to the probable life of the apparatus.

Plaintiff is a corporation engaged in repairing machines at Lewistown. Louis W. Spalding is its president and general manager. He has been a machinist for about 27 years. He testified to having had considerable correspondence with Teeple relative to purchasing a welding apparatus; that he finally came to Minneapolis where he closed the contract in question on April 9, 1913; and that before signing the same he had a long discussion with Mr. Teeple and Mr. Smith at the latter's place of business, with reference to their not placing any other machine of the kind in his county, the exclusive clause in the contract, and the claim that the apparatus was protected by patent. He further testified that the welding proposition was a new thing in his country, and that after installing the plant he sent advertising matter out over Fergus county concerning the same. That he kept an account of the work done by the plant, and that in 1913 it did a gross business of \$1,224.05; in 1914, \$2,355.05; in 1915, \$3,032.79, and during the first nine months of 1916, \$2,487.75. That the net profits on such work ran from 50 to 75 per cent, and that it averaged about 70 per cent. That the work consisted largely of repairing engines and automobiles coming from all parts of the county, until defendant placed other plants of the same make therein, when there was a falling off of the business from the distant parts of the county.

It is a well established rule, that damages to be recovered for breach of contract, are those which arise according to the usual course of things from the breach itself, or such as may reasonably be supposed to have been in the contemplation of the parties at the time of entering into the contract, as a probable result of a breach of it. Hopkins v. Sanford, 38 Mich. 611; Billmeyer v. Wagner, 91 Pa. St. 92. Only direct and immediate damages are recoverable under the first part of this rule. Speculative profits or remote losses are not within its meaning. Hamilton v. McPherson, 28 N. Y. 72, 84 Am. Dec. 330. But, under the latter part of the rule, profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness, or where from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into. Howard v. Stillwell Mnfg. Co. 139 U. S. 199, 11 Sup. Ct. 500, 35 L. ed. 147; Emerson v. Pacific Coast & N.

P. Co. 96 Minn. 1, 104 N. W. 573, 1 L.R.A.(N.S.) 445, 113 Am. St. 603, 6 Ann. Cas. 973; Allison v. Chandler, 11 Mich. 542; Chapman v. Kirby, 49 Ill. 211.

The validity of the contract for the breach of which this action was brought is not questioned. Whether defendant assumed liability for a breach of its terms was for the jury. The sale of 8 welding plants of the same make in the county without plaintiff's consent, was contrary to the terms of the contract. If, as the result of such sales made by defendant, welding work from the different parts of the county was diverted from plaintiff to its loss of profits, plaintiff is entitled to damages. Of what could such damages consist but the profits that would have been made on the work lost as the result of the breach? To measure such damages, the jury must have some basis for an estimate, and what more reasonable than to take the profits derived from like work in the locality, during the time plaintiff was placing its machines in that territory in violation of the terms of the contract? It will hardly be contended but that the parties at the time the agreement was made could reasonably be supposed to have contemplated the fact that there would be a falling off of the plaintiff's work, and thereby a loss of profits, as the probable result of the placing of several like plants in the county. The vendor sold the apparatus to the plaintiff for use in its repair work at Lewistown, guaranteed to it the exclusive use of the same in the county as against other plants of its make, agreed not to place any other of its make in the county without plaintiff's consent, guaranteed the plaintiff against any infringement of patent, and warranted the machine to do any kind of work to be found in general welding. ber of sales made by defendant of like machines in the county, their · proximity to the plaintiff's place of business, the character of the work and the locality from which it came, the amount thereof and the profits derived therefrom, were properly received in evidence.

When the jury was put in possession of these facts, it was given the best and most natural means of determining the amount of work which the plaintiff lost as the result of the breach and the amount of profits it might have derived therefrom had it not been for the interference of defendant. The work of welding is unlike a merchantable commodity, it can have no labeled price, each job must be measured at the time by

its character and extent, and the profits to be derived therefrom must be arrived at in the same manner. The reasoning in Emerson v. Pacific Coast & N. P. Co., supra, is applicable. Profits were within the contemplation of the parties, and are therefore the proper basis for the award of damages.

Appellant assigns as error that the verdict was given under passion and prejudice, and that it is excessive. There was proof offered upon the trial to the effect: That the average amount of work done by the plant sold to plaintiff was over \$220 per month for 41 months, and that the profit thereon was 70 per cent; that the plant sold by defendant to Mc-Hardie at Buffalo, 38 miles southwest of Lewistown, in Fergus county, did work to the amount of \$100 per month, and the profit thereon was 70 per cent, and that the bulk of this work came from within a radius of 25 miles of Buffalo and some from within a few miles of Lewistown; that the plant sold by defendant to Wiseman at Grassrange, 32 miles east of Lewistown, in Fergus county, did work to the amount of about \$50 per month and the profit thereon was 50 per cent; that the plant sold by defendant to Halverson, at Winniford in the northeast part of Fergus county, 48 miles from Lewistown, made a profit on its work of 50 per cent; that the plant sold by defendant to Daigle, at Denton in the northwestern part of Fergus county, 41 miles from Lewistown, did work to the amount of \$100 per month, and the profit thereon was 50 per cent; that defendant also sold a plant to Marion Powers at Stanford in Fergus county, 54 miles northwest of Lewistown, and one to Ross & Devlin at Stanford in Fergus county, but no testimony was offered as to the amount of work done by the last two plants referred to.

From this testimony it appears that 3 of the plants placed in the county by defendant's jobbers, were doing considerable more work than plaintiff was doing. It does not appear how much work the other 3 plants sold by defendant were doing. How much of this work would have gone to the plaintiff had defendant refrained from placing these 6 plants in that county was for the jury to determine from all the testimony in the case. However this may be, we do not consider the verdict so large as to justify this court in interfering therewith, nor does it appear that the same was given under prejudice or passion.

We discover no prejudicial error in the charge of the trial court when considered as a whole, nor did the court err in refusing the requests to charge. The evidence is sufficient to sustain the verdict and the judgment appealed from should be affirmed. It is so ordered.

DAVID L. FAIRCHILD v. HENRY B. HOVLAND.1

January 11, 1918.

No. 20,640.

Corporation — breach of contract to deliver stock — evidence.

It is held:

- (1) That the evidence supports a finding by the jury of a valid agreement by defendant to transfer and deliver to plaintiff certain full paid shares of the stock of a corporation and his failure and refusal to perform the same.
- (2) That the record presents no reversible error in the admission of evidence.

Action in the district court for St. Louis county to recover \$23,000. The facts are stated in the opinion. The case was tried before Dancer, J., and a jury which returned a verdict for \$20,750. Defendant's motion for a new trial was granted, unless plaintiff consented to a change in the verdict as to the date from which it was to draw interest. Plaintiff having consented, the motion for a new trial was denied. From that order, defendant appealed. Affirmed.

- C. E. Purdy, for appellant.
- A. L. Agatin and F. H. DeGroat, for respondent.

Brown, C. J.

This action was brought to recover the value of 1,000 shares of the stock of the Live Oak Development Company, a corporation organized under the laws of the state of Arizona. Plaintiff had a verdict and defendant appealed from an order denying a new trial.

1Reported in 165 N. W. 1053.

The evidence tends to show the following facts: Plaintiff is a civil and defendant a mining engineer. For a number of years prior to the transactions out of which the present controversy arose they had been intimate personal friends, and with one or two other persons to some extent associated together in the promotion of various mining ventures in Arizona, New Mexico and elsewhere. Their relations and dealings one with the other were of a character to establish confidence and respect for each other as to all dealings and transactions in which they were jointly concerned. Some time about January, 1909, defendant acquired and then held in his own right an option for the purchase of a group of mining claims in the state of Arizona. The claims were regarded as promising a paying mine upon proper development and therefore of substantial value. He called the option to the attention of plaintiff, and to the attention of Hoval A. Smith and Walter Barrows, who also to a certain extent had been associated with him in his mining ventures, and after one or two conferences it was agreed to organize a corporation to take over the option and to develop and operate the prospective mine. To that end the Live Oak Development Company was organized under the laws of the state of Arizona, with a capital stock of \$500,000, divided into 50,000 shares of \$10 each. Defendant was named as president of the corporation, Smith as secretary, and plaintiff as treasurer. Upon the completion of the organization defendant transferred the option to the company, and the ownership thereof was the basis for its subsequent operations. The agreement by which the transfer was effected contained appropriate stipulations and conditions, and among others, that 35,000 shares of the capital stock of the company should be offered and sold to the general public, and that 15,000 shares, referred to in the record as bonus stock, should be held in reserve for the use and benefit of defendant, to be issued to him free of charge in the event a paying mine was developed on the option property. While none of that stock was to be issued or sold to the general public, it was expressly agreed, as a part of the contract of transfer to the corporation, that defendant might cause the issuance of a portion thereof to himself prior to the development of a mine, upon the payment of an amount equal to the assessments theretofore levied upon the stock sold to the public; it being the plan of such sales to require a certain per cent of the par

value to be paid upon the issuance of the stock to purchasers, the balance being payable from time to time as the board of directors of the corporation might direct. It was the claim of plaintiff on the trial below and also in this court, that with the other persons heretofore' named, including defendant, he was one of the promoters of the Live Oak Company, and that the reservation of the bonus stock was for his benefit as well as for the benefit of defendant and Smith. While he made this claim, and testified accordingly, we discover no evidence of an express contract granting to him any particular interest in or right to that stock. But acting on the theory and contention that he had an interest therein, though undefined in amount or extent, some time after the formation of the company he caused the secretary thereof, Smith, to issue to him one thousand shares thereof, for which he then paid the sum of \$3,000; that being the amount of the assessment payable on sales of the other stock to the general public. Defendant was not advised of the issue of the stock at the time. He was president of the company and had signed stock certificates in blank, to enable ready sales in his absence, one of which was used in the issuance of the stock to plaintiff. As soon as issued plaintiff pledged the stock as security for the payment of a personal debt, but that fact is not of special importance. If he had the right to the stock it would seem of no concern to defendant how it was subsequently disposed of.

We here reach a material feature of the case in respect to which the parties are in violent dispute, and which presents the turning point of the case. Defendant testified that plaintiff had no interest whatever in the bonus stock, and that his act in causing the secretary to issue the 1,000 shares to him was without authority or right. He further testified that, upon discovering that the stock had been issued, he promptly demanded of plaintiff a surrender thereof for cancelation. That recognizing the wrongfulness of his act plaintiff complied with the demand and surrendered the stock to defendant, upon the promise of defendant to reimburse him for the \$3,000 paid by plaintiff when the stock was issued. The stock was delivered to defendant and defendant thereafter reimbursed plaintiff as agreed upon.

Plaintiff flatly disputes this claim of defendant. He contended on the trial, and so testified, that defendant upon learning of the issuance of the stock made no objection of the kind testified to by him or otherwise. On the contrary, that defendant subsequently stated to plaintiff that he, defendant, had obligated himself to deliver to certain eastern parties a number of shares of the partly paid Live Oak stock, and to enable him to discharge his obligations in that respect he requested a transfer to him of the 1,000 shares so issued to plaintiff, and that if plaintiff would do so defendant would refund the amount plaintiff had paid therefor, and when it became known that the option property had developed a paying mine, which would entitle defendant to all the bonus stock, defendant would cause to be issued to plaintiff 1,000 shares thereof full paid and without charge. It was upon this agreement, as plaintiff claims, and not otherwise, that he transferred the stock to defendant.

The option claims contained a valuable deposit of ore, the enterprise was a complete success and the Live Oak Company became a prosperous mining concern. Defendant was entitled under the contract to the bonus stock, and it was duly issued to him. Plaintiff demanded the 1,000 shares claimed by him under the agreement and defendant refused to deliver them. This action followed, though it was not commenced for several years after the transaction, and after plaintiff became entitled, if at all, to the stock.

Defendant's motion for a new trial was upon the grounds of error in the admission of evidence, and that the evidence is insufficient to support the verdict. The assignments of error in this court present the same points.

We find no error in the admission of evidence of a character to require a new trial. The ruling admitting certain exhibits may have been technical error, for the documents appear not to have been very material. But defendant was in no substantial view prejudiced. 2 Dunnell, Minn. Dig. 1916 Supp. § 7180. We answer the question whether the evidence supports the verdict in the affirmative. An extended discussion thereof will serve no useful purpose. It is sufficient to say that we have fully considered the evidence with the result stated.

The pivotal issue in the case centers around the contention of plaintiff that he was one of the promoters of the Live Oak Company, and as such entitled to share in the bonus stock; that he rightfully caused

the secretary to issue to him 1,000 shares of that stock, which he subsequently transferred to defendant, in consideration of his agreement to issue to plaintiff an equal number of shares of the same stock when the success of the company became assured, and when plaintiff should request the same. We find evidence in the record reasonably tending to support plaintiff's contention. The evidence is far from conclusive in his favor, but if believed by the jury is amply sufficient to establish his right of action. It is not disputed that the plaintiff and defendant and Smith and Barrows, at defendant's instance and request, conferred together in reference to the particular enterprise; all became interested in and were officers of the corporation when organized. And though their separate interests were not defined, yet the jury were justified in finding that it was contemplated by the parties that each should in some way benefit by the venture in the event of its success, and that defendant upon being informed thereof acquiesced in the issuance to plaintiff of the 1,000 shares of the bonus stock. The testimony of plaintiff is direct and positive that defendant so acquiesced, and that he agreed in consideration of a transfer of that stock to defendant to later issue to plaintiff the same number of shares of the bonus stock fully paid. Defendant as positively denied having so agreed. Clearly this was an issue for the jury. And we conclude, without further reference to the testimony or the claims of the respective parties, that the evidence presented by plaintiff on its face discloses a valid agreement to issue the stock to plaintiff, founded upon a sufficient consideration, and therefore enforceable. The trial court and jury accepted suck evidence as expressing the truth. The evidence and facts disclosed by the record will not justify the conclusion that the verdict is clearly or palpably wrong.

Order affirmed.

VERNARD W. McKAY v. MINNESOTA COMMERCIAL MEN'S ASSOCIATION.¹

January 11, 1918.

No. 20,647.

Accident insurance — total disability — request to charge jury.

1. Plaintiff, a traveling salesman, was injured in a railway collision. The fact that he continued his journey and two days later made another journey did not establish as a matter of law that his disability to follow his vocation was not total at the time of the accident, and instructions to that effect were properly refused. An instruction which was sufficiently covered by the general charge was also properly refused.

Same — evidence.

2. Receiving the proofs of claim in evidence "for all the purposes for which they are properly admissible" was not error.

Pleading - supplemental answer.

Whether the filing of a supplemental answer shall be permitted at the trial is discretionary with the trial court.

Abatement and revival - assignment of proceeds of litigation.

4. Where a plaintiff, pendente lite, assigns the proceeds of the litigation but not the cause of action, he still retains a sufficient interest therein to entitle him to continue the action as plaintiff.

No reversible error.

There were no reversible errors in the rulings at the trial nor in the charge.

Action in the district court for Hennepin county to recover \$1,300 upon defendant's accident policy. The defense is set out in the second paragraph of the opinion. The case was tried before Fish, J., who when plaintiff rested denied defendant's motion to dismiss the action and at the close of the testimony defendant's motion for a directed verdict in favor of plaintiff for \$150, and a jury which returned a verdict for \$1,164. From an order denying its motion for judgment in favor of

¹Reported in 165 N. W. 1061.

plaintiff for \$150 notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Rieke & Hamrum, for appellant.

G. A. Will, for respondent.

TAYLOR, C.

Plaintiff, a traveling salesman, resided in the city of Minneapolis but traveled in the state of Iowa, and while in that state made his headquarters at Cresco. He carried accident insurance in defendant association. On the evening of July 29, 1915, while on his way to his home at Minneapolis, the train on which he was riding collided with a freight train, and he sustained an injury to his head. He continued his journey and arrived at his home in the afternoon of the following day. Friday. July 30. He remained at home until Sunday evening suffering a severe pain in his head, which his wife vainly tried to alleviate by applying cold cloths. On Sunday evening he insisted on going out on his trip and took the train for Blockton, Iowa, where he arrived about noon on Monday. On reaching Blockton his condition was such that, instead of attempting to do any business, he immediately went to bed at the hotel where he remained until Wednesday, when he was assisted to the train and went to Cresco and consulted a physician. He was treated by the physician on that day, and on the next day, by advice of the physician, he went to a hospital and had an X-ray photograph made. After an examination of the X-ray, he was informed that he would be laid up a long time and returned home. On reaching home, he called Doctor Hedback under whose care he remained until the following March. In September, at the request of his employers, he went to Council Bluffs, but reached there in such a condition that he immediately went to bed where he remained until his wife came and brought him home. He was not able to resume his duties until March, 1916.

He brought suit upon the contract of insurance. The contract provided for an indemnity of \$50 per week for a period not exceeding 26 weeks for a total disability resulting from an injury sustained while riding as a passenger on a passenger train and caused by an accident to such train. Plaintiff sought to recover under this provision. The

contract further provided that, in case of accidental injury, "which at the time of happening does not immediately cause total disability, but which shall result in total disability at a date later than the happening thereof * * * then and in all such cases, there shall be paid such member for and during the time of total disability, a weekly benefit of \$12.50 for 12 consecutive weeks." In its answer defendant admitted the contract of insurance; but asserted that plaintiff's total disability was not immediate, and that he was only entitled to \$12.50 per week for 12 weeks, or \$150 in all, and tendered judgment for that amount. The principal controversy at the trial was whether total disability dated, from the time of the accident or from a later time. The trial resulted in a verdict of \$1,164 for plaintiff. Defendant made a motion for judgment in plaintiff's favor for only the amount tendered, or for a new trial, and appealed from an order denying the motion.

Defendant insists that because plaintiff continued his journey to his home, and thereafter went by rail to Blockton and from there to Cresco, his period of total disability did not begin until he reached Cresco, although he had been unable to perform any of the duties of his vocation other than to ride upon the train. By riding upon the train and being compelled to take to his bed in consequence of doing so, he accomplished nothing in furtherance of his business. The jury found that his total disability dated from the time of the accident, and we find ample evidence to sustain that finding.

Defendant presented three requests for instructions. The first and second were incorrect and properly refused. The first because it stated as a matter of law that the disability was neither immediate nor total; the second because it implied that the fact that plaintiff continued his journey to his home and was able to travel upon the railroad established that his disability was not total at the time of the accident. The third was in the language of the by-law to the effect that if the injury did not immediately cause total disability but resulted in total disability later, the amount of the recovery was \$12.50 per week for not more than 12 consecutive weeks. While this instruction was proper enough, the point covered by it was clearly and fairly submitted to the jury in the general charge and that was sufficient.

Plaintiff offered in evidence the proofs of claim which he had filed with defendant and which were made out on blanks furnished by defendant. Defendant inquired: "Will they be received only for that purpose (to prove the filing of the proofs of claim), or for the purpose of the contents that they show?" To which the court replied: "They will be received for all the purposes for which they are properly admissible." Defendant assigns this as error but we think the assignment not well taken. Their contents were admissible for the purpose of showing whether the proofs were such as were required by the by-laws.

Defendant offered in evidence an assignment from plaintiff to H. H. Wadsworth of any and all sums that should become due plaintiff as the proceeds of this litigation executed pendente lite, and urges that the ruling excluding it was error. The answer raised no issue as to plaintiff's right to recover whatever amount should be found to be due under the contract, but on the contrary tendered him judgment for \$150 admitted to be due.

Defendant made no application to file a supplemental answer until it offered the assignment in evidence at the trial, and whether permission to do so should be granted at that time was discretionary with the trial court. Brown v. Kohout, 61 Minn. 113, 63 N. W. 248. assignment, even if it had transferred the cause of action instead of transferring whatever sum should be recovered in the action, would not have barred the continuance of the action in the name of plaintiff. G. S. 1913, § 7685. But the assignment, being only of the proceeds of the litigation, apparently contemplated that plaintiff should continue the litigation to a final judgment. Furthermore, where a plaintiff's rights as between himself and his assignee pendente lite will be affected or determined by the outcome of the suit, he has a sufficient interest therein to entitle him to continue its prosecution as plaintiff. Walker v. Sanders, 103 Minn. 124, 114 N. W. 649, 123 Am. St. 276. The amount of the payment to Wadsworth depended upon the outcome of the litigation and the ruling was not error.

Defendant also complains of various rulings made during the trial.

Doctor Hedback testified to plaintiff's condition from August 9 until the following March, and that he knew that plaintiff was a traveling salesman whose duties required him to travel from place to place selling his wares. The doctor was then asked: "From your examination of him and your knowledge of the case, would you say that he was capable of performing his duties as a salesman during the times you examined him?" Thereupon the following took place:

Mr. Rieke: "That is objected to as irrelevant, incompetent, immaterial—the witness has not shown himself qualified to testify as to this plaintiff performing his duties; no foundation laid."

The Court: "What more would be needed? Is it necessary that he serve an apprenticeship at the business in order to give an opinion as to his capacity?"

Mr. Rieke: "Does it follow, your Honor, that this witness, a physician, knows what the duties are of plaintiff in conducting his business? It strikes me—and I am making it in good faith—that there is no foundation laid; the witness has not shown himself qualified to testify."

The Court: "He may answer."

We have given this colloquy in full because defendant makes it the basis of its complaint concerning the rulings. The doctor was asked his opinion as an expert. It was competent for him to state whether in his opinion plaintiff was capable of engaging in physical and mental exertion, and, if so, to what extent. The question asked may not have been technically accurate in that it did not confine the doctor to a statement of his opinion as to the extent to which plaintiff could properly engage in physical and mental labor. The objection was not put upon this ground, but, even if it had been, we could not reverse for a mere technical error which was clearly without prejudice. Defendant does not complain of the ruling so much as of the remark accompanying it. While the remark was unnecessary, we think defendant is inclined to magnify its importance, and that it was without substantial prejudice to defendant's rights. Defendant contrasts this ruling and remark with a ruling and remark made on the following day and seeks to infer prejudice therefrom. On the following day defendant called an expert and, after reciting the various trips made by plaintiff, asked the expert whether in his opinion plaintiff was totally disabled immediately after the injury. The ruling excluding the question was clearly right for the question, even if otherwise permissible, omitted the very important element of plaintiff's condition during and at the termination of these

trips as shown by the evidence. And we find nothing prejudicial in the remark of the court to the effect that the physicians could inform the jury as to what they found and what the consequences were likely to be, but could not be allowed to decide the issue as to disability.

Defendant also complains of the charge of the court, not as incorrectly stating the rules of law, but as tending to bias the jury against defendant. The charge was somewhat argumentative, but the material questions were all submitted to the jury for determination, and we think defendant has no substantial ground for complaint.

Defendant has raised several other questions, none of which have been overlooked, but which require no special mention.

Order affirmed.

JOHN FITZGIBBONS v. WILLIAM J. BOWEN AND OTHERS.1

January 11, 1918.

No. 20,648.

Mutual benefit association — pension fund — by-laws construed in favor of member.

1. Where a mutual organization, devoted to the general welfare of its members, adopts and provides for a disability pension plan in its by-laws, the rule of construction applicable to such by-law, is the same as applied to a contract of insurance, prepared by an insurance company, and a liberal construction will be given in favor of the rights of the member.

Same — complaint sufficient.

2. Complaint considered and held to state a cause of action.

Same - verdict sustained by evidence.

3. Evidence supports the verdict.

Action in the district court for Hennepin county against the persons doing business under the name and style, Bricklayers, Masons and Plasterers International Union of America, to recover a disability pension.

¹Reported in 165 N. W. 1059.

The answer among other matters alleged that the claim of plaintiff on account of injury was presented for allowance pursuant to the laws, rules and regulations of defendant, and after hearing was disallowed by the executive board of the international union, which had authority to hear and determine the claim. The case was tried before Leary, J., who at the opening of the trial denied defendants' motion for judgment on the pleadings and denied their motions for a directed verdict, and a jury which returned a verdict for \$582.14. From an order denying their motion for judgment notwithstanding the verdict or for a new trial, defendants appealed. Affirmed.

Fifield & Finney, for appellants. W. H. McGrath, for respondent.

QUINN, J.

This is an action to recover a disability pension of \$5 per week, under the rules and by-laws of the defendant order. The plaintiff had a verdict in the sum of \$582.14, and from an order denying their motion for judgment or for a new trial, the defendants Jones and the Union, the only defendants served, appealed.

The Bricklayers, Masons and Plasterers International Union of America, which will be hereinafter referred to as the defendant, is an unincorporated association for the mutual protection and benefit of all its members. Its powers are executive, legislative and judicial. The government of subordinate unions is vested in one international union. It is the ultimate tribunal to which all matters of general importance are referred. The revenues are derived from monthly pro rata assessments upon the members.

The plaintiff began work as a mason and bricklayer at the age of 12 years, and remained actively engaged in that occupation until he was over 69 years of age, when he was injured, as hereinafter related. He is now 81 years old. He joined the defendant organization as a charter member in 1885, dropped out about a year later, joined again in 1903, and has been a member in good standing ever since. His health had been good and he had worked continuously at his trade. On October 15, 1905, he met with an accident which he claims is the cause of his disability. Immediately after the accident he was taken to a hospital where he was

operated on for a strangulated hernia. He remained there a number of days; then went to his daughter's house where he has since lived. His health has not been as good since the accident and he has done no work since that time. He is compelled to wear a truss, and visits his physician occasionally. He testified that he had not been able to work at his trade since his injury.

In January, 1914, defendant adopted a pension plan which went into effect January 1, 1915. At the same time an assessment of 25 cents per month was levied against all members for the maintenance of a fund to be known as the "Old Age Pension and Disability Fund," under the pension plan, which, among other things, provided:

"Section 1 (A) Any member who has reached the age of sixty (60) years, who has been in continuous good standing for a period of twenty (20) years, and finds it impossible to secure sustaining employment, may receive the sum of \$5.00 per week.

"Section 1 (B) Any member having a continuous membership of ten (10) years who, by reason of permanent injury, not contributed to or brought about by his own improper conduct, is totally incapacitated for work, may receive the sum of \$5.00 per week."

The pension plan further provided the method of application for a pension; also for its adoption or rejection by the local union, for a review by the executive board, and for appeal to the international union.

November 4, 1914, plaintiff applied for a pension, using the form furnished by defendant. This was filled out for him by another, but not under his direction. In the application it was stated that rupture was the cause of his disability, that the injury occurred at Fourteenth and Central, North East, Minneapolis, while lifting a stone, and that he was permanently disabled. The application was examined by the local union and its allowance recommended under the rules of the order. Upon review by the executive board the same was disallowed, and the disallowance was, upon appeal, affirmed by the international union in January, 1916. Neither the executive board nor the international union stated any reason for their decision.

The several assignments of error may be considered and disposed of under two general heads:

- (1) Were the defendants entitled to judgment on the pleadings?
- (2) Is the verdict sustained by the evidence?

Whether defendants were entitled to judgment on the pleadings depends upon the construction and effect to be given to subdivision B of section 1, above set forth. The defendant is a mutual organization devoted to the welfare of its members, and it accordingly adopted the disability pension plan above referred to. To enable the order to carry out this plan a pension fund is maintained by monthly assessments of 25 cents upon each of its members. In considering this case and in construing the by-law referred to, which constitutes the contract upon which plaintiff must recover, if at all, the rule of construction applicaable to a contract of insurance prepared by an insurance company, is applicable, and a liberal construction will be given to the by-law in order to effect the purposes of a beneficiary order of this kind. Such is the well established rule in this state. Jewell v. Grand Lodge A. O. U. W. 41 Minn. 405, 43 N. W. 88; Finch v. Grand Grove U. A. O. D. 60 Minn. 308, 62 N. W. 384; Carey v. Switchmen's Union of North America, 98 Minn. 28, 107 N. W. 129.

Applying the above rule of construction, we have no difficulty in arriving at the conclusion that subdivision B of section 1 is, in effect, retrospective, and that the plaintiff's case comes under its provisions. "Any member having a continuous membership of ten (10) years who, by reason of permanent injury, * * * is totally incapacitated for work, may receive the sum of \$5.00 per week." This subdivision, when read and considered in connection with the manifest intent and purpose for which the defendant was organized, must be construed to provide for all of its members who were then, or might thereafter, become totally incapacitated for work. It speaks in the present tense. To say that an assessment was placed upon all members, those incapable of performing work as well as those capable, and deny those incapacitated from the benefits thereof, would, in our opinion, do violence to the purpose and intent for which the order was organized.

We hold that the complaint states a cause of action and that the defendants were not entitled to judgment upon the pleadings.

It is contended that the verdict is not sustained by the evidence. The plaintiff is an old man, 81 years of age. He began work as a brick-

layer when 12 years old and continued in that occupation until he was nearly 70. No intimation is made that he ever faltered or failed to do his part. He sustained an injury which resulted in strangulated hernia and has had to wear a truss for upwards of 12 years. He has done no work since his injury and says he is unable to work at his trade.

The local members of the order, who were his neighbors and best informed as to his condition, were of the opinion that he was entitled to the pension. The jury, after hearing the testimony, so found. The trial court was satisfied with the verdict and we think it was supported by the evidence.

The order appealed from is affirmed.

ALBERT J. DICKINSON v. CITIZENS ICE & FUEL COMPANY. ELIZABETH G. DICKINSON v. SAME.¹

January 11, 1918.

Nos. 20,649, 20,650.

Stipulation - motion to vacate because improvidently made.

1. Upon the showing made it cannot be held that the court below erred when denying defendant's motion to vacate a stipulation for settlement of the causes of action on the ground that it was improvidently made.

Corporation — ratification of stipulation.

2. The circumstances leading up to the making of the stipulation and the subsequent conduct of the majority of the directors of the defendant, were such that the court might find a ratification thereof even though it was not signed by defendant's attorney, but by its president and secretary at the direction of such attorney, and even though the president and secretary were not directed, at a legally called meeting of the board of directors, to execute it.

Two actions in the district court for Ramsey county to recover \$1,100 and \$2,750, respectively. The facts are stated in the opinion. Defend-

¹Reported in 165 N. W. 1056.

ant's motion to set aside a stipulation of settlement for the reason stated at the end of the second paragraph of the opinion was denied, Michael, J. From the order denying its motion and from the judgment entered pursuant to the stipulation, defendant appealed. Affirmed.

James Manahan, for appellant.

Kenneth G. Brill, for respondents.

HOLT, J.

Defendant appeals in two cases from the orders denying its motion to vacate a stipulation for judgment and from the judgments entered pursuant to the stipulation. The cases are precisely alike, except as to the amounts involved, and are treated as one appeal.

In August, 1916, plaintiffs began their suits, alleging fraud in the sale of certain shares of defendant's capital stock, and asking for a rescission of the sale and a return of the purchase money. The defense was a general denial and a ratification of the sale after discovering the true situation. The actions were reached for trial early in May, 1917. Prior thereto the attorneys for the respective parties had had negotiations looking towards a settlement, which culminated in an agreement as to the terms thereof on the day of trial. Thereupon the cases were stricken from the calendar, and plaintiffs' attorney, pursuant to the agreement prepared, signed and gave a stipulation embodying the terms thereof to defendants' attorney, who took it to the defendant, a corporation, for signature. Defendant's name was affixed and attested by the president and secretary of the corporation. The stipulation provided for the payment to plaintiffs of specified sums of money before July 1, 1917, and the return to it of the stock sold. If such sums were not paid before that date, judgments were to be entered as prayed in the com-The money was not paid on the date set, but defendant, through its attorney, then assured plaintiff's attorney that its directors would arrange to raise and pay the same, if a few days additional time was granted. The request was complied with and promises renewed that the money would be directly forthcoming, until July 14, 1917, when defendant appeared by another attorney with motions to vacate the stipulation because improvidently made and because its board of

directors had not authorized the execution thereof. The motions were denied and the judgments entered.

There is no question but that the stipulation was made between the attorneys in good faith, and no fraud or collusion is hinted at. The standing of the attorney, who then represented defendant and who corroborates plaintiffs' attorney as to the facts and circumstances connected with the making of the stipulation and the endeavors of defendant to comply with its provisions, excludes every inference of undue advantage or the possibility that there was not a thorough understanding of the subject matter of the settlement and its terms. Hence, the trial court's conclusion that the stipulation was not improvidently entered into cannot be disturbed by us.

We are also of the opinion that the court below did not err when refusing to vacate the settlement because unauthorized. The president of a corporation is presumed to take charge of its litigation and to employ the necessary legal aid. 7 R. C. L. 631. The stipulation here signed relates to such controversies as any corporation may be called upon to meet in court. In 8 Thompson, Corp. § 1462, it is said: "In the absence of proof to the contrary there is a general presumption that the president has authority to represent the corporation in the execution of ordinary contracts." Defendant appears to be a business corporation. Not infrequently the executive officers of such corporations. are its general managers. We are not informed by any article of incorporation, by-law, or practice in whom the active management of defendant is lodged. But it does appear that before the stipulation was executed it was considered and approved by a majority of the board of directors in meeting assembled, and after consultation with the able attorney who was in charge of the defense. It is true, this meeting is termed illegal because not called as specified in a by-law. But a majority of the directors were there, and all present evidently considered it a proper meeting at which to authorize the settlement. Plaintiffs and their attorney were so led to believe. When the time for the payment of the stipulated sums arrived the directors met, though not as a board, and personally tried to raise the money needed, requesting plaintiffs to delay entering the judgments at the agreed time. The request was granted.

Even were it conceded that the chief executive officers of defendant had no power to sign the stipulation without express authority from the board of directors granted at a duly called meeting, the conduct of the individual directors with full knowledge of what had been done may amount to ratification. It was for the court below to pass upon the truthfulness of the affidavits of the two (of the nine) directors who claimed to have had no knowledge of the settlement until July, 1917. Either these two directors took no active part in the business, or else it was the practice of the corporation to leave the management to its executive officers. But, however that may be, it is undoubtedly true that a majority of the directors with full knowledge of the situation, upon competent legal advice and after ample time for consideration, directed the execution of the stipulation. What they as individuals knew in attempting to carry on the business of the corporation, the corporation also must be held to know. Instead of taking immediate steps to repudiate what the president and secretary had done, these individual directors acquiesced therein for over a month, and then procured from plaintiffs additional time within which to carry out its terms. Such conduct should now preclude the corporation from asserting want of authority in the president and secretary to execute the stipulation. The following authorities sustain this view: 8 Thompson, Corp. § 1485; Henry v. Colorado Land & Water Co. 10 Colo. App. 14, 51 Pac. 90; Indiana Die-Casting Develop. Co. v. Newcomb, 184 Ind. 250, 111 N. E. 16; Nelson-Bethel Clothing Co. v. Pitts, 141 Ky. 242, 132 S. W. 430; Omaha Consol. Vinegar Co. v. Burns, 49 Neb. 229, 68 N. W. 492; Walworth County Bank v. Farmers' Loan & Trust Co. 16 Wis. 658; Ford v. Hill, 92 Wis. 188, 66 N. W. 115, 53 Am. St. 902; Owyhee Land & Ins. Co. v. Tautphas, 121 Fed. 343, 75 C. C. A. 557; Indianapolis Rolling Mill v. St. Louis, F. A. S. & W. R. 120 U. S. 256, 7 Sup. Ct. 542, 30 L. ed. 639. In Bank of U. S. v. Dandridge, 12 Wheat. 64, 83, it is said: "A board may accept a contract, or approve a security by vote, or by a tacit or implied assent." The same principle is recognized in Thompson v. Central Passenger Ry. Co. 83 N. J. Law, 777, 85 Atl. 201, but the facts there were held to fall short of showing ratification.

Another feature of the case would seem to conclude defendant on this appeal. It is elementary that a party cannot accept the benefits of an unauthorized contract, and at the same time repudiate it. In one of the affidavits in support of the motion to vacate the stipulation the secretary states, in substance, that, although he was opposed to settling the litigation by the stipulation, he deemed it necessary for the continued existence of defendant that these actions should not then be tried. Thus defendant by means of the settlement obtained an advantage of admitted value to it. That being so, it should not now be allowed to place plaintiffs at a disadvantage. Michigan Cent. R. Co. v. Chicago K. & S. Ry. Co. 132 Mich. 324, 93 N. W. 882; Scott v. Middletown, U. & W. R. Co. 86 N. Y. 200; Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 131 U. S. 371, 9 Sup. Ct. 770, 33 L. ed. 157.

Our conclusion is that the orders and judgments must be affirmed. So ordered.

STATE EX REL. LENA CHAMBERS AND ANOTHER v. DISTRICT COURT OF HENNEPIN COUNTY AND ANOTHER.1

January 11, 1918.

No. 20,728.

Workmen's Compensation Act — right to compensation — accident outside Minnesota.

1. The Minnesota Workmen's Compensation Act is elective. By becoming subject to it the employer and employee agree that the employer will pay and the employee receive for an accidental injury the compensation fixed by the statute and that the employee will forego his common law right of action. It is not important who is at fault or whether anyone is. The right to compensation is not based on tort. It is contractual. The relator's husband was a resident of North Dakota. He entered into a contract of employment with a Minnesota corporation doing a grain brokerage business in Minnesota and having its place of business in Minneapolis and so far as appears none elsewhere. The contract was made there. It contemplated that he should solicit business ¹Reported in 166 N. W. 185.

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for the corporation in Minnesota, North Dakota and elsewhere. An automobile was furnished him for use in his work. While using it in the course of his employment it accidentally overturned at a point in North Dakota and he was killed. Under these facts it is held that the Minnesota compensation act is applicable and an award of compensation should be made.

Same — certiorari — what orders reviewable.

2. The writ of certiorari does not bring to this court for review orders in a compensation proceeding not in their nature appealable. It does not lie to review an order for judgment on the pleadings for such an order is not in its nature appealable. It lies to review the judgment entered pursuant to such an order.

Upon the relation of Lena Chambers the supreme court granted its writ of certiorari directed to the district court for Hennepin county and the Honorable Horace D. Dickinson, one of the judges thereof, to review the proceedings in that court under the Workmen's Compensation Act brought by Lena Chambers, widow, and as mother of Marion Chambers, against C. C. Wyman & Company, as employer, for the death of her husband.

McNamara & Waters, for relator.

John F. Bernhagen, for respondents.

DIBELL, C.

Certiorari to the district court of Hennepin county to review a judgment denying the relator compensation under the Workmen's Compensation Act for the death of her husband.

1. Judgment was entered on the pleadings on motion of the defendant employer. The facts stated in the complaint, which we are to take as established, are substantially these: The relator's husband was a resident of North Dakota. He was employed by C. C. Wyman & Company, a Minnesota corporation doing a general grain brokerage business in Minnesota and having its place of business in Minneapolis. It does not appear that it had a business situs elsewhere. The contract of employment was made in Minneapolis. It contemplated the rendition of services by the deceased in soliciting business in Minnesota, North Dakota and elsewhere. The company furnished him an automobile which

he used in performing such services. While he was in North Dakota on May 5, 1917, the automobile was accidentally overturned and he was killed. The accident arose out of and in the course of the employment.

The question is whether with the facts as stated the motion of the employer for judgment on the pleadings was rightly granted. Liability would be conceded had the accident happened in Minnesota. The claim of the employer is that compensation cannot be awarded for an accident occurring outside the state.

The Minnesota compensation act provides for elective compensation. G. S. 1913, § 8202, et seq.; Mathison v. Minneapolis St. Ry. Co. 126 Minn. 286, 148 N. W. 71, L.R.A. 1916D, 412. The employer and employee become subject to the act only by agreement express or implied. If they elect to become subject to it they in effect contract that the employee shall receive and the employer will pay the statutory compensation for all accidental injuries arising out of and in the course of the employment and the employee waives his common law right of action. It is unimportant whether the cause of the accident is referable to a tortious or a blameless act, or whether if tortious the employer or some third person is blameworthy, or even that the employee is at fault if not wilfully so. The statute requires compensation of the employer, when the employer and employee have elected to become subject to the act, "in every case of personal injury or death of his employee, caused by accident, arising out of and in the course of employment, without regard to the question of negligence, except accidents which are intentionally self inflicted or when the intoxication of such employee is the natural or proximate cause of the injury * * * " G. S. 1913, § 8203. The statute evidences no affirmative purpose to restrict the operation of the contract to accidental injuries happening within That a statute might make such limitation expressly is clear; or the wording of it might require such construction by way of proper inference.

In Connecticut, New York, Rhode Island, West Virginia, Indiana and New Jersey, under varying statutes and with facts changing from case to case, it is held that compensation may be awarded for an injury occurring outside the state. Kennerson v. Thames Towboat Co. 89 Conn.

367, 94 Atl. 372, L. R. A. 1916A, 436; Post v. Burger & Gohlke, 216 N. Y. 544, 111 N. E. 351, Ann. Cas. 1916B, 158; Grinnell v. Wilkinson, 39 R. I. 447, 98 Atl. 103; Gooding v. Ott, 77 W. Va. 487, 87 S. E. 862, L. R. A. 1916D, 637; Hagenback v. Leppert (Ind. App.) 117 N. E. 531; Rounsaville v. Central R. Co. 87 N. J. Law, 371, 94 Atl. 392. And see Foley v. Home Rubber Co. 89 N. J. Law, 474, 99 Atl. 624, where the right to compensation was tacitly conceded. Massachusetts and California are opposed. Gould's Case, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372; North Alaska Salmon Co. v. Pillsbury (Cal.) 162 Pac. 93, L.R.A. 1917E, 642. And so are the English cases. Tomalin v. Pearson (1909) 2 K. B. 61, 2 B. W. C. C. 1; Schwartz v. India Rubber, etc., Co. (1912) 2 K. B. 299, 5 B. W. C. C. 390; Hicks v. Maxton, 124 L. T. J. 135, 1 B. W. C. C. 150. The cases are collected and discussed in the treatises and annotated cases. Honnold, Workmen's Comp. § 8; 1 Bradbury, Workmen's Comp. 34-68; Dosker, Manual Comp. Law, §§ 261-263; Kennerson v. Thames Towboat Co. 89 Conn. 367, 94 Atl. 372, L.R.A. 1916A, 443; Post v. Burger, 215 N. Y. 544, 111 N. E. 351, Ann. Cas. 1916B, 158, 10 N. C. C. A. 888.

A consideration at length of the arguments which support the diverse views does not serve our present purpose. Different arguments appeal to different courts. Often a distinction is drawn between an elective and a compulsory act with the suggestion that in the case of the former there is a contract to pay which is the basis of the right to compensation, that a contract is not local as is a tort, and therefore state boundaries are not important. Whether an agreement to pay is imported into the contract of hiring where a compulsory act is in force is not material to our inquiry for ours is not such an act. That under our act there is a contract obligation is clear. The weight of authority supports the view that, under an elective act like ours and with facts such as are present, an accidental injury though it occurs outside the state is compensable. This view we adopt. There is nothing in Johnson v. Nelson, 128 Minn. 158, 150 N. W. 620, opposed. The injury there involved occurred in Wisconsin and the employer and employee were by their election subject to the compensation act of that state. was held that the employee could not maintain a common law action in Minnesota for the Wisconsin injury.

A basic thought underlying the compensation act is that the business or industry shall in the first instance pay for accidental injuries as a business expense or a part of the cost of production. It may absorb it or it may put it partly or wholly on the consumer if it can. The economic tendency is to push it along just as it is to shift the burden of unrestrained personal injury litigation. When a business is localized in a state there is nothing inconsistent with the principle of the compensation act in requiring the employer to compensate for injuries in a service incident to its conduct sustained beyond the borders of the The question of policy is with the legislature. It may enact an elective compensation act bringing such result if it chooses. In the case before us the business of the employer was localized in the state. What the employee did, if done in Minnesota, was a contribution to the business involving an expense and presumably resulting in a profit. It was not different because done across the border in North Dakota. It was referable to the business centralized in Minnesota.

Sometimes the construction which we adopt will result to the immediate advantage of the employee and against the employer and sometimes the result will be the reverse. Whatever view is adopted perplexing situations may arise. Business has scant respect for state boundaries. An industry may be located a part in one state and a part in another, or it may have separate business situs in two or more, and its employees may from time to time work in each and may reside in one or another at their convenience. Situations may arise where it is difficult to say whether the employment is referable by the act of the parties or by intendment of law to a business conducted in one state or another and whether the governing law, applicable to an injury coming from the employment, is that of the one or the other, or whether there may be a recovery of the employer under the compensation act of one state and of a third person under the common law of the state of the injury. They are safely left for determination when they arise. Here, if the facts stated in the complaint are true, the employment was referable to the business conducted in Minnesota and its compensation act is the governing law between employer and employee. We hold that judgment on the pleadings should not have been directed for the employer.

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2. The statute contemplates the review of questions of law arising in the administration of the compensation act by certiorari. G. S. 1913, § 8225. It does not intend the review by certiorari of orders and judgments not in their nature appealable under our practice. An order for judgment on the pleadings from early times has been held not appealable. 1 Dunnell, Minn. Dig. § 309. The writ sought to review the order granting the motion for judgment. To convenience the parties we allowed a remand of the case for the entry of judgment and the making of amendments appropriate to bring the judgment here for proper review. Some inconvenience has resulted to the parties from relator's improper procedure. We emphasize the importance of the observance of the statute and settled practice by withholding from the relator statutory costs.

Judgment reversed.

STATE EX REL. LYNDON A. SMITH v. PROBATE COURT OF HENNEPIN COUNTY.¹

January 18, 1918.

No. 20,581.

Inheritance tax — how computed — deduction of Federal tax.

The Minnesota inheritance tax is to be computed upon the clear value of the beneficial interest in the property which passes from the decedent to the beneficiaries designated by the will or by the statute, and the Federal inheritance tax is to be deducted from the value of the estate in ascertaining such clear value.

Upon the relation of Lyndon A. Smith, Attorney General, the supreme court granted its writ of certiorari directed to the probate court of Hennepin county and the Honorable John A. Dahl, judge thereof, to review the proceedings in that court allowing \$1,016.33, paid as an estate tax under 39 St. 777, as an expense of administration. Affirmed.

Lyndon A. Smith, Attorney General, and Egbert S. Oakley, Assistant Attorney General, for relator.

No appearance for respondent.

¹Reported in 166 N. W. 125.

TAYLOR, C.

Writ of certiorari to review the judgment of the probate court of Hennepin county determining the amount of the inheritance tax due to the state from the estate of Victoria E. Linton, deceased. The estate descended in equal shares to the two children of the deceased. The probate court found the value of the estate, deducted therefrom the claims paid and the expenses of administration, and took the balance as the basis for computing the state inheritance tax. The court included the Federal inheritance tax imposed by the act of Congress of September 8, 1916, as an expense of administration, and the sole question presented is whether the court erred in deducting the amount of the Federal tax from the value of the estate before computing the amount of the state tax. Doing so in this case lessened the state tax \$25.41.

The statute imposes a tax upon the transfer of property "by will or by the intestate laws" from the person who died possessed thereof, and provides that the tax shall be a specified per centum of the clear value of the beneficial interest in the property which passes to the beneficiaries designated by the will or the statute. G. S. 1913, §§ 2271, 2272. According to the statute the tax is to be computed only upon the clear value of the property, or the interest therein, which actually passes to the beneficiaries; and is not to be computed upon the amounts expended in administrating the estate or in paying proper charges against it. State v. Probate Court of St. Louis County, 138 Minn. 107, 164 N. W. 365.

The Federal tax operated to lessen, by the amount of such tax, the clear value of the beneficial interest which passed to the two children, and the ruling of the probate court was correct.

We think that the claim that the Federal act imposes a tax upon the estate and not upon the transfer to beneficiaries and for that reason is inhibited by the Federal Constitution, is not well founded. True the Federal act differs radically from the Minnesota act, and imposes the tax "upon the transfer of the net estate;" but the net estate, as defined by the act, is the net value of the property left for distribution to the beneficiaries after all proper charges, including all charges imposed by the laws of the jurisdiction, have been paid and deducted.

Judgment affirmed.

1[39 St. 777, \$ 201.]

EMMA J. HARWOOD AND ANOTHER v. JOSEPH MELONEY AND ANOTHER.¹

January 18, 1918.

No. 20,632.

Landlord and tenant — tenant holding over liable for rent.

Where at the end of the term a lessor takes possession of a part of the leased premises not then occupied by the lessee, but the lessee retains possession of the remainder and refuses to vacate, the lessor may treat him as holding over under the lease as to the part retained by him, and may collect a proportionate part of the rental for the term during which he continues to occupy it.

Action transferred to the district court for Beltrami county to recover \$1,120. The facts are stated in the opinion. Plaintiffs' motion for judgment on the pleadings was granted, Stanton, J. From the judgment entered pursuant to the order for judgment, defendants appealed. Affirmed.

S. M. Koefod and W. E. Rowe, for appellants. Walter L. Chapin, for respondents.

TAYLOR, C.

Defendants appeal from a judgment rendered on the pleadings.

The complaint sets forth a written lease by which plaintiffs rented to defendants a tract of land having a frontage of 400 feet in the town-site of New Roosevelt for the term of one year from and after the first day of November, 1911, for the sum of \$320. The lease contained the usual provisions for re-entry, and the usual covenant by the lessees to surrender the possession of the premises to the lessors at the end of the term. The complaint further alleged, that defendant took possession of the premises under the lease, occupied them during the year and paid the rent therefor; that at the end of the year defendants surrendered the west 50 feet of the premises, but remained in possession of all the

¹Reported in 166 N. W. 125.

remainder thereof, and occupied and used the same for a period of 4 years after the term named in the lease had expired; and that the proportion of rent for the part of the premises retained by defendants was seven-eighths of the rent for the entire premises, and demanded judgment therefor. The answer alleged that before making the written lease defendants had occupied the premises from time to time for short periods with the permission of plaintiffs and had paid plaintiffs therefor; that at the time of making the written lease they had a large amount of timber products stored upon the premises; that they were required by plaintiffs either to take a lease for one year for \$320 or to remove their property; that plaintiffs falsely represented that they were the owners of the land and entitled to the exclusive possession thereof; that the rent demanded was exorbitant, but to avoid the expense of removing their property defendants executed the lease, occupied the premises during the year, and paid the rental therefor; that before the end of the year they notified plaintiffs in writing that they would not surrender possession at the end of the term, would not renew the lease with plaintiffs and would not recognize plaintiffs as the owners of the premises or entitled to possession thereof, but would recognize the Minnesota & Manitoba Railroad Company as owner of the land and would take a lease from that company therefor; that on November 1, 1912, defendants leased the premises from the railroad company and have ever since held possession and occupied them under the railroad company; that after the first day of November, 1912, plaintiffs took possession of the west 50 feet of the land at a time when defendants were not occupying that part of the premises and have ever since retained possession of such 50 feet; that the rental value of the part of the premises of which defendants retained possession did not exceed three-fourths of the rental value of the whole premises; and that the value of the use of the whole premises did not exceed \$40 per year. The answer further alleged that an action is pending, undecided, between the railroad company and plaintiffs to determine the title to the land; and that defendants are informed and believe that the railroad company is the owner thereof.

Plaintiffs made a motion for judgment on the pleadings for \$240 per

year, being three-fourths of the rental value as fixed by the lease. This motion was granted and judgment rendered accordingly.

Defendants do not question the rule that a tenant who has received possession of the leased premises from his landlord cannot dispute the title of the landlord until he has returned possession to the landlord or has been compelled to yield to a paramount title. Defendants concede that they received possession from plaintiffs, and make no claim that they have been compelled to yield to a paramount title. They rely for reversal upon the well established rule of the common law that, where a landlord wrongfully evicts his tenant from a part of the demised premises, the whole rent is suspended until the possession of such part has been restored to the tenant. Christopher v. Austin, 11 N. Y. 216; Morris v. Kettle, 57 N. J. Law, 218, 30 Atl. 879; Kuschinsky v. Flanigan, 170 Mich. 245, 136 N. W. 362, 41 L.R.A. (N.S.) 430, Ann. Cas. 1914A, 1228; Halligan v. Wade, 21 Ill. 470, 74 Am. Dec. 108; Moore v. Mansfield, 182 Mass. 302, 65 N. E. 398, 94 Am. St. 657; 16 R. C. L. 953, § 461.

They contend that plaintiffs, by taking possession of the west 50 feet of the land, in effect evicted them therefrom and in consequence thereof are not entitled to recover rent for the remainder of the premises. But the facts do not bring the case within the rule invoked. At the end of the year plaintiffs were entitled to the possession of the entire tract and defendants had covenanted to restore it to them. Plaintiffs found the west 50 feet unoccupied and took possession of it as they had a right to do, but defendants retained possession of the remainder and wrongfully refused to vacate. The landlord does not forfeit his rent under the rule invoked, unless he has dispossessed the tenant of a part of the premises in violation of the terms of the lease. there has been no violation of the terms of the lease by plaintiffs. The only violation of the terms of the lease was the refusal of defendants to surrender the remainder of the leasehold at the end of the term. Retaining a portion of the premises gave plaintiffs the right to treat defendants as holding over, and, except for the fact that plaintiffs took possession of a part of the land, they would have the right to collect the full amount of the rent although defendants retained only a portion of the premises. Bless v. Jenkins, 129 Mo. 647, 31 S. W. 938;

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Ballance v. City of Peoria, 180 Ill. 29, 54 N. E. 428; Cavanaugh v. Clinch, 88 Ga. 610, 15 S. E. 673.

But plaintiffs having taken possession of the unoccupied part of the land must make a proportionate reduction in the rent. Defendants allege that the rental value of the whole tract is much less than the rental which they had agreed to pay, but as they saw fit to remain in possession in violation of their covenant, and concede that the rental value of the portion retained by them is three-fourths of the rental value of the whole tract, they are not in position to complain because plaintiffs elected to treat them as tenants holding over and accepted their own apportionment of the rent by taking judgment for only three-fourths of the rent reserved by the lease.

Without appearing to place much reliance thereon, defendants also invoke the rule that a tenant, who has been induced to enter into the lease by fraud, may attack his landlord's title, if necessary to enable him to protect rights of which he is being deprived by the fraud. The facts do not bring the present case within this rule. The only misrepresentation charged is that plaintiffs asserted that they were the owners of the land, but the truth of this assertion is denied only upon information and belief; and it is admitted that plaintiffs are asserting their title and seeking to establish it in court against the adverse claimants. Defendants neither have nor claim any interest in the land, except such as they acquired under the lease from plaintiffs and the subsequent lease from the railroad company. While plaintiffs were in unquestioned possession of the land under claim of ownership, defendants voluntarily leased it from them, received possession from them, and have ever since retained such possession without interference by anyone. lease impaired no rights of defendants in the land, and defendants having taken possession under it, must restore such possession to plaintiffs before they can be heard to dispute plaintiffs' title. Sage v. Halverson, 72 Minn. 294, 75 N. W. 229; also numerous cases cited in note found in 4 Ann. Cas. at page 108, et seq. If the mere fact that the landlord asserted that he was the owner, when in truth he was not, was sufficient ground for permitting the tenant to attack his landlord's title, the rule that a tenant is estopped from denying the title of his landlord would be well nigh abrogated.

Judgment affirmed.

C. H. TAYLOR v. DULUTH, SOUTH SHORE & ATLANTIC RAILWAY COMPANY.

January 18, 1918.

No. 20,680.

Carrier — disputed ownership of shipment — reasonable time for investigation.

1. Where, upon arrival at destination, property is demanded from a carrier by the consignee and also by an adverse claimant, the carrier is entitled to a reasonable time for investigation, upon its request therefor, before an action will lie against it.

Same — liability as warehouseman.

2. Where the adverse claimant claimed no rights under the contract of shipment, and made no claim to the property until after it had arrived at its destination, the carrier owed to him only the duties of a bailee or warehouseman, and may relieve itself from liability by showing that without fault or negligence on its part it is unable to produce or deliver the property.

Appeal and error — reversal.

3. Defendant interposed both the above defenses and they were erroneously excluded at the trial. As the record shows conclusively that defendant did not waive them, there must be a new trial.

Action in the district court for St. Louis county to recover two horses or \$500, their value. The facts are stated in the opinion. The case was tried before Fesler, J., and a jury which returned a verdict for \$185. From an order denying its motion for a new trial, defendant appealed. Reversed.

Thomas S. Wood and G. A. E. Finlayson, for appellant.

Lathers & Hoag and Fryberger, Fulton & Spear, for respondent.

TAYLOR, C.

Action in replevin for two horses. Plaintiff had a verdict and defendant appeals from an order denying a new trial.

1Reported in 166 N. W. 128.

Moses Goldberg shipped the horses from Ontonogan, Michigan, to Duluth, Minnesota, consigned to himself. Immediately after their arrival at Duluth plaintiff's attorney made a demand for them upon defendant's agent, and, on being informed by the agent that he could not pass on the question but would refer it to their attorney, served upon him the summons and complaint in this action without allowing him any time whatever to confer with the attorney or with anyone Although the action is in replevin, plaintiff executed neither bond nor affidavit of ownership, and, in the absence of these, of course could not, and did not, issue a requisition for taking possession of the In its answer defendant alleged it had no knowledge or information sufficient to form a belief as to whether plaintiff was the owner of the horses; that they were consigned to Goldberg; that both Goldberg and plaintiff demanded them; that defendant was entitled to a reasonable time in which to investigate the validity of plaintiff's claim; that for the purpose of making such investigation defendant refused to deliver the horses to either; that it retained them no longer than a reasonable time for such purpose; that without the knowledge of defendant and without any fault or negligence on its part, and while the horses were still in the car in which they had arrived, Goldberg wilfully opened the car and took the horses therefrom and defendant has never since had possession of them. The answer also contained an allegation that the freight charges were unpaid and that defendant had a lien therefor, but, as defendant asserted no right to retain possession of the horses under this claim as against plaintiff's demand, this allegation is not important.

At the trial defendant attempted to show that it received the horses from a connecting carrier; that immediately upon their arrival both plaintiff and Goldberg demanded them; that defendant refused to deliver possession to either until it could investigate their respective claims; that it took measures to prevent either from obtaining possession of them during such investigation; that Goldberg removed them without defendant's knowledge within an hour after their arrival, and that defendant was without fault in the matter. While defendant succeeded in eliciting scraps of this evidence, the court excluded all substantial parts of it, on the objection of plaintiff, and ruled that the only ques-

tion for determination was whether plaintiff was the owner of the horses and so charged the jury.

Plaintiff practically concedes in this court that defendant tendered a valid defense, and now contends that defendant waived the other questions by litigating the question of title. But the record shows conclusively that defendant based its defense upon its right to a reasonable time for investigation and its freedom from negligence or other fault, and not upon plaintiff's lack of title. The answer contained no allegation as to the ownership of the horses; it merely alleged that defendant had no knowledge or information as to plaintiff's title. At the trial defendant directed all its efforts to an attempt to prove facts and circumstances showing that it was entitled to a reasonable time for investigation and that it was without fault in the matter. The entire record negatives plaintiff's claim that defendant voluntarily litigated the question of title, and it is impossible to sustain any claim of waiver on this record.

That the carrier is entitled to a reasonable time for investigation where, immediately upon arrival, the property is claimed by the consignee and also by a stranger to the contract of shipment is too clear to require argument. Merz v. Chicago & N. W. Ry. Co. 86 Minn. 33, 90 N. W. 7; 2 Hutchinson, Carriers (3d ed.) § 753.

Plaintiff was not a party to the contract of shipment and claimed no rights thereunder. His claim was adverse to that of the consignor and consignee, and was not made known to the carrier until the contract of carriage had been completed. Plaintiff and defendant did not stand in the relation to each other of shipper and carrier at the time plaintiff made his demand, and defendant owed plaintiff no other duties than those of a bailee or warehouseman. It was therefore competent for defendant to show, as against plaintiff, that the property had been lost without fault or negligence on the part of defendant. 2 Hutchinson, Carriers (3d ed.) § 685.

Defendant tendered a valid defense which was excluded from consideration, and there must be a new trial.

Order reversed.

C. S. DEAVER v. ARIEL E. NAPIER.1

January 18, 1918.

No. 20.687.

Adverse claims - payment of taxes into court unnecessary, when,

1. Under G. S. 1913, § 8060, the fee owner may maintain an action to determine adverse claims against a tax title holder, without paying into court the amount paid at the tax sale and subsequent taxes, though if he had brought an action to cancel the tax certificate under G. S. 1913, §§ 2168-2170, he would be required to make such payment.

Taxation — .name of person to whom assessed — no presumption in aid of proof.

2. There is no presumption that lands assessed in 1902 and 1904 in the name of a particular person are so assessed in 1908 when notice of expiration is issued; nor does the fact that the property was assessed in the name of the record owner in 1902 and 1904, coupled with the fact that there was no change in record ownership until after 1908, afford a presumption that the assessment was the same in 1908; nor does the presumption that public officers perform their duties dispense with proof that the property was assessed in the name of the person to whom the auditor directed the notice; nor is the recital in tax receipts of the treasurer that the property was assessed in the name of a particular person proof of the fact.

Same — expiration of redemption — auditor's indorsement not proof of giving notice.

3. The indorsement of the auditor on a tax certificate, required by G. S. 1913, § 2135, to the effect that the time for redemption has expired and that the land is unredeemed is not proof that notice of expiration has been given.

Same.

4. The prima facie effect as evidence given to tax certificates by G. S. 1913, § 2132, of title in fee in the grantee after the time for redemption has expired, does not prove the giving of the notice of expiration.

1Reported in 166 N. W. 187.

Action in the district court for Hennepin county to determine adverse claims to vacant and unoccupied land. The answer alleged that for many years defendant had been the owner in fee simple and in exclusive possession and had paid the taxes. The case was tried before Molyneaux, J., who at the close of the testimony denied defendant's motion to dismiss the action and her motion for judgment, made findings and ordered judgment in favor of plaintiff, subject to a lien of defendant for \$326.64, to satisfy which it was ordered that the property be sold. From an order denying her motion for a new trial, defendant appealed. Affirmed.

Rieke & Hamrum and William R. Morris, for appellant. Andrew Fawcett, for respondent.

DIBELL, C.

Action to determine adverse claims. There were findings for the plaintiff upon the issue as to title. The defendant was given a lien for the amount paid for tax certificates and for subsequent taxes paid, and interest. He appeals from the order denying his motion for a new trial.

- 1. The plaintiff has the fee title. The defendant has a tax title. The action is the ordinary one under G. S. 1913, § 8060, to determine adverse claims. By G. S. 1913, §§ 2168-2170, it is provided that in any action to set aside a tax judgment or tax certificate or to remove a cloud created by a tax certificate the plaintiff shall pay into court the amount for which the land was sold with subsequent taxes paid by the certificate holder, and interest. Section 8060 makes no such requirement, and in an action under it the complaint does not disclose the nature of the defendant's title. Such payment was not made. The defendant claims that it is necessary even when the action is under section 8060. We cannot so hold. The fee owner may bring his action in the ordinary form under section 8060, without paying into court, or he may proceed under sections 2168-2170, and then must pay into court. See Culligan v. Cosmopolitan Co. 126 Minn. 218, 148 N. W. 273; Foster v. Clifford, 110 Minn. 79, 124 N. W. 632.
- 2. The statute requires the notice of expiration of redemption period to be directed to the person in whose name the lands are assessed. G. S. 1913, § 2148. The notice was issued on October 14, 1908, and was

directed to the American Surety Company. The assessment books for 1902 and 1904 were offered in evidence and they showed the assessments for these years in the name of the surety company. No later assessment was offered. From the ones in evidence no presumption arose that the lands were so assessed in 1908 when the notice was issued, and this was the material date. Sterling v. Urquhart, 88 Minn. 495, 93 N. W. 898.

Nor does the fact that the record ownership of the property was in the surety company when the 1902 and 1904 assessments were made, and that there was no change in record ownership until after 1908, afford a presumption that the assessment continued as in 1902 and 1904.

Nor does the presumption that public officers perform their duties obviate the necessity of such proof. Sterling v. Urquhart, 88 Minn. 495, 93 N. W. 898.

In proof of a lien for taxes paid, the defendant offered in evidence tax receipts covering 1908 and prior and subsequent years. They recited that the lands were assessed in the name of the surety company. The assessment books returned by the assessor and filed with the county auditor are the primary evidence. The statute does not require a statement in the tax receipt of the one in whose name the property is assessed. The tax receipts are not proof of the fact. They are by statute proof of the fact of payment of taxes.

By his notice of expiration of redemption period the tax title holder eliminates the right of redemption and divests the title of the fee owner. It is the last act in the forfeiture. He must follow the statute and must make strict proof and is not favored by presumptions.

- 3. The statute requires the auditor to indorse on the tax certificate that the property covered thereby is unredeemed and that the time for redemption has expired. G. S. 1913, § 2135. This was done. Such an indorsement does not evidence the giving of notice of expiration. Jewell v. Truhn, 38 Minn. 433, 38 N. W. 106.
- 4. By G. S. 1913, § 2132, the tax certificate is made prima facie evidence of certain facts relative to the assessment, judgment and sale, and "of title in the grantee therein after the time for redemption has expired." It is not evidence that the notice of expiration has been given, and it is evidence of title only upon proof of the giving of such notice. Mueller v. Jackson, 39 Minn. 431, 40 N. W. 565. The plaintiff does not

assert the invalidity of the judgment or sale. His only claim is that the right of redemption has not been eliminated. The statute is without application.

The points discussed are those urged by the defendant. The defendant was entitled to a lien for the amount paid for the tax certificates and subsequent taxes, with interest, and this was given. The plaintiff was rightly adjudged the owner subject to this lien.

Order affirmed.

M. E. TRUMER v. SOUTH SIDE STATE BANK.1

January 18, 1918.

No. 20,851.

Bank and banking — statutory limitation inapplicable to Federal bonds.

By G. S. 1913, § 6358, providing that the total liabilities of any person, corporation or copartnership to a state bank shall never exceed 15 per cent of its capital and surplus, it was not intended to limit the amount of bonds of the United States that a state bank might purchase or hold.

Action in the district court for Hennepin county by a stockholder of defendant bank to compel it to sell United States government bonds owned by it in excess of 15 per cent of its combined surplus and capital. Defendant's motion for judgment in its favor on the pleadings was granted, Leary, J., who made findings and dismissed the action. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Affirmed.

L. B. Byard, for appellant.

In enacting G. S. 1913, § 6388, the legislature had in view a purpose similar to that attained in statutes requiring common carriers to serve all persons without discrimination. In limiting the credit to be extended to a single individual the statute accomplishes two purposes. It prevents

¹Reported in 166 N. W. 127.

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not only a reckless extension of credit, but it also insures in a large measure a fair and equitable distribution of the bank's credit facilities to those members of the community, who in a commercial sense subsist upon such credit. This does not have reference to the banks of Minneapolis and St. Paul, but to the rural bank whose ability to lend is far less than its patrons' need to borrow. It is well known that such banks are large borrowers from metropolitan banks. It is highly important, therefore, that no one shall be permitted to monopolize the credit facilities of a rural bank. The economic and industrial needs of village and agricultural communities demand that the power of such banks to lend may be made use of by as large a number as possible of those who have a legitimate right to borrow.

A commercial bank is an instrument of business. It is therefore more than a mere bailee of money. It is not an accumulator of funds for safe investment. It is rather an institution where money is concentrated for immediate redistribution.

When interpreted in this light, there can be no anomaly in holding that the statute prevents banks from loaning more than the prescribed amount even to the Federal government. In times like the present the economic security of the small community is as much an object of concern to that government as is the prosperity of the nation. In conserving the parts we conserve the whole.

The fact that bonds of the state and of the United States are omitted is striking. The legislature had before it the question of the extent to which banks should be allowed to purchase public securities. The fact that they are not mentioned in the list of like securities shows that the omission was intentional. It is also to be said that in excepting obligations of municipal corporations from the operation of the act, the legislature was using the word "corporation" to include governments. Will the respondent say that statute does not apply to the bonds of foreign municipalities? If he is consistent he must answer no.

It is claimed, if appellant's construction of the statute be adopted, the act is unconstitutional as an unwarranted obstruction of the power of the Federal government to borrow money. We do not believe that this objection is sound. In the first place banks subject to the statute are corporations created by the state. They owe their very existence to the consent of

the sovereign. The powers and authorities exercised by them are determined by the sovereign. It is logical to assume, therefore, that the state may control and direct the manner in which shall be exercised the powers given by it to corporations of its own creation.

Lancaster, Simpson & Purdy, for respondent.

The provision of the statute is not designed to force the bank to loan its funds in support of local business or to any class of individuals, for the provisions in subdivisions 1, 2, and 3 under which the bank may loan all its funds on certain classes of securities, would clearly negative any such legislative intention. The limitation is clearly intended to prevent embarrassment of the bank through loaning a considerable portion of its funds on the credit of one person. The state Constitution provides for the investment of school funds in United States bonds. Art. 8, § 2. Section 6393, G. S. 1913, provides that savings banks, whose funds have been safeguarded to a much greater extent than the funds of commercial banks, may invest in bonds or other interest bearing obligations of the United States.

Unless the context clearly indicates a different meaning, the term corporation used in connection with the word "person" means a private corporation. McDougal v. Board of Suprs. 4 Minn. 130 (184); Lancey v. King County, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817; Donohue v. City of Newburyport, 211 Mass. 561, 98 N. E. 1083.

It would be difficult to conceive of a more direct interference on the part of a state with the exercise by the United States of a Federal power than to grant the relief asked by plaintiff. By article 1, section 8, of the Constitution Congress shall have power to borrow money on the credit of the United States. If the prohibition against loaning to the Federal government can be applied to state banks, it can be applied to other corporations created by the state, and, so far as the Federal question goes, could be applied to any funds within the state belonging to individual citizens of the state. The state cannot through its creature interfere with the exercise by the Federal government of its granted power. See Weston v. City Council of Charleston, 2 Peters, 448, 7 L. ed. 481; People v. New York City, 67 U. S. 620, 633, 634, 17 L. ed. 451; Farm-

ers' & Mechanics' Sav. Bank v. Minnesota, 232 U. S. 516, 34 Sup. Ct. 354, 58 L. ed. 706.

BUNN, J.

Defendant is a banking corporation organized and existing under the laws of this state. Plaintiff, a stockholder, brings this action to compel defendant to sell an amount of bonds of the United States purchased by it sufficient to reduce the amount retained to 15 per cent of its combined capital actually paid in and surplus. The trial court granted judgment for the defendant and plaintiff appeals.

Plaintiff contends that a loan by a state bank to the United States in an amount in excess of 15 per cent of the combined capital and surplus of the bank is forbidden by G. S. 1913, § 6358, which, as far as material, reads as follows:

"6358. Loans, how limited.—The total liabilities to it (the bank), as principal, surety or indorser, of any person, corporation, or copartnership, including the liabilities of the several members thereof, shall never exceed fifteen (15) per cent of its capital actually paid in cash and of its actual surplus fund." etc. etc.

Counsel for plaintiff, in an able argument, presented the view that the Federal government is a "corporation" within the meaning of that term as used in the above statute. Manifestly the question is not whether the United States may, as stated by Chief Justice Marshall in Chisholm v. Georgia, 2 Dallas (2 U.S.) 419, 446, 1 L. ed. 440, "without impropriety, be termed" a corporation. It is rather this: Did the legislature intend, when it limited the total liabilities to a state bank, as principal, surety or indorser, of any person, corporation or copartnership, to forbid the bank to purchase the bonds of the United States in an amount in excess of 15 per cent of the bank's capital and surplus? We answer this question in the negative. The purpose of the limitation of the statute is clear. It is well known that many banks have met disaster through large loans to a single individual, copartnership, or corporation, whose business officers of the bank were often closely connected with. The object of the legislature plainly was to prevent disaster to or embarrassment of the bank by loaning a large portion of its funds to any one business 139 M.-15

concern, whether an individual, corporation or copartnership. The suggestion that the provision of the statute was also designed to prevent a monopoly of the credit facilities of rural banks, thus insuring extension of credit to as large a number as possible, is answered by other provisions of the statute. Except the reserve the bank is required to keep on hand, there is absolutely no limitation on the amount it may loan to any particular class of borrowers, or on any particular class of securities. When we consider the evil which it was the object of the legislature to remedy, and the fact that bonds of the United States are recognized by our statutes and by everybody as the very safest investments, we have no heaitation whatever in deciding that the legislature did not intend by the provisions quoted to-limit the amount of the United States bonds that a state bank might purchase or hold. We do not consider the point doubtful enough to demand further discussion or to require reference to the decided cases. They are readily available, and are all in accord with the view we take.

It is unnecessary to consider any other question. Judgment affirmed.

GEORGE GUGGISBERG v. WILLIAM H. BOETTGER.1

January 25, 1918.

No. 20,694.

Cause of action assignable.

1. A cause of action for damages sustained by fraud or deceit is one for injury to property, not for injury to the person, survives the death of either party, and is assignable.

Corporation — sale of stock — evidence.

2. The decision is sustained by the evidence.

Action in the district court for Brown county to recover \$1,800 for fraudulent representations made in the sale of stock in a corporation. The case was tried before Olsen, J., who made findings and ordered judg-

¹Reported in 166 N. W. 177.

ment in favor of plaintiff for \$1,700. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

Pfaender & Erickson, for appellant.

Somsen & Dempsey, for respondent.

BUNN, J.

Through the efforts of defendant and another, plaintiff was induced to purchase stock of a corporation known as the Ware's Grain Binder Attachment Company. Six other persons also purchased the stock in varying amounts. In this action plaintiff claims that he and the others, who assigned their claims to plaintiff, were induced to purchase the stock by fraudulent representations on the part of defendant. The trial resulted in a decision for plaintiff based on his own claim, and five of those assigned to him, the other claim being abandoned on the trial. Judgment was entered on the decision, and defendant brings the case here on appeal from this judgment.

1. The contention chiefly relied on for a reversal is that the causes of action of those who assigned to plaintiff were not assignable. It seems to be agreed that the test of whether a cause of action is assignable is whether it would survive the death of either party. This is correct. Kent v. Chapel, 67 Minn. 420, 70 N. W. 2, 27 L. R. A. (N.S.) 415.

Applying this test, and under our decisions, we hold that a cause of action for damages to a person as to his property, real or personal, through fraud or deceit, is assignable. Section 8174, G. S. 1913, provides that a cause of action arising out of an injury to the person dies with the person of either party, except a cause of action for death by wrongful act, but that all other causes of action, whether arising on contract or not, survive the death of either party. Under this statute it is plain that a cause of action for fraud survives. We do not see that G. S. 1913, § 7674, in any way modifies section 8174, or that it has any bearing on the question before us, which is hardly an open one under our decisions. Billson v. Linderberg, 66 Minn. 66, 68 N. W. 771, holds that a cause of action for fraud and deceit is not one for an injury to the person, but for an injury to property, and therefore survives death. Hansen Mercantile Co. v. Wyman, Partridge & Co.

105 Minn. 491, 117 N. W. 926, 21 L.R.A.(N.S.) 727, holds that a cause of action for injury to the property of an owner is assignable, and that a cause of action for malicious attachment of property is one for an injury to property. See also Cornell v. Upper Michigan Land Co. 131 Minn. 337, 155 N. W. 99.

2. The findings that the fraudulent representations were made, were of material facts and not mere expressions of opinion or "trade talk," are challenged. We will simply say that we have examined the evidence and find it ample to sustain the findings of the trial court and its conclusion that plaintiff was entitled to recover.

Judgment affirmed.

THOMAS H. WILLIAMS v. ARTHUR A. DOBSON COMPANY AND OTHERS.¹

January 25, 1918.

No. 20,706.

Negligence — contributory negligence — questions for jury.

In an action to recover damages against a city and its employee under a contract, for injury sustained as the result of falling into an open sewer trench, where the trial court, at the close of the testimony, directed a verdict for the defendants, evidence considered and held, that the question of contributory negligence was for the jury, and that the testimony upon the question of the negligence of defendants made a case for the jury.

Action in the district court for Blue Earth county against Arthur A. Dobson Company, Globe Indemnity Company and City of Lake Crystal to recover \$5,200 for injuries received by falling into an excavation for a sewer. Both answers alleged contributory negligence on the part of plaintiff. The case was tried before Comstock, J., who granted the motion of defendant city and that of defendant Dobson Company for a

¹Reported in 166 N. W. 189.

directed verdict. From an order denying his motion for a new trial, plaintiff appealed. Reversed.

Hughes & Ellsworth and H. L. & J. W. Schmitt, for appellant. Ware & Junell and C. S. Strom, City Attorney, for respondent.

QUINN, J.

Action to recover damages for injury sustained by plaintiff as the result of falling into an open sewer trench made by defendant Dobson Company for the defendant city under contract. At the close of the testimony, upon motion, the trial court directed a verdict for defendants. From an order denying his motion for a new trial, plaintiff appealed.

At the close of the testimony a motion was made on behalf of the defendants, Dobson Company and the city, for a directed verdict, upon the ground that the plaintiff had shown by his own evidence that he was guilty of contributory negligence, and that he had failed to prove that the defendants, or either of them, were guilty of negligence. Upon these motions a verdict was directed.

Crystal street is one of the public streets of the defendant city, extending in a northerly and southerly direction, Blue Earth street crossing it at right angles about a block south of where the plaintiff resides on Prince street. The Dobson Company had a contract with the city to install for it a sewerage system. The work of construction had been in progress since July, 1916, and on October 26 of that year had been completed on Prince street and south on Crystal street, in the center thereof, to within about 150 feet of the north cross-walk on Blue Earth street, and the trench refilled. From that point the trench had been dug south beyond the cross-walk. At the cross-walk the trench was between 5 and 6 feet in depth. The earth from the excavation had been thrown to the west side. The cross-walk was of stone, and in digging the trench one of the stones, which was about 5 feet long, something over 2 feet wide and 7 or 8 inches thick, was removed and placed at the east side of the trench.

The plaintiff is a small man 5 feet 4 inches tall, 67 years of age, and keeps a shoe store. At about 7:45 in the evening of the day in question, he started out from his home to walk for a little exercise,

going west on the sidewalk to Crystal street, thence south on the east side of Crystal street one block to Blue Earth street. Then he turned west and proceeded to cross the street on the stone cross-walk referred to. He testified that it was then very dark, that in order to follow the cross-walk and keep in line with it he had to look ahead at the lights a block or two in the distance, and that, when he got to about the center of the street, he stumbled and fell over the stone that had been left there by the workmen, into the trench, breaking the bones of the ankle and instep of his right foot. Plaintiff further testified that, while he knew the sewer was being constructed on Crystal street, he did not know that the work had proceeded as far south as this crossing. He also testified that there were no lights at this intersection of the streets; that there was no guard, light or signal of any kind at the crossing; that after his fall he called for help, and that Mr. Peterson and his daughter, Gladis Fox, came to his rescue and assisted him out of the trench and to his home.

Edward Peterson testified that he lived at the corner of Crystal and Blue Earth streets; that there was a street lamp at that corner, but that it was not burning on the night of October 26 and had not been for several nights; that he and his daughter had been to church and when they returned heard a cry for help; that they followed up the cry and found the plaintiff in the ditch; that he was standing with his hands on the top of a rock that had been removed from the cross-walk and laid on the east side of the ditch partly on the cross-walk. ditch had caved in a little and the stone projected over its edge a trifle. That it was about 8 o'clock when he assisted the plaintiff out, and in taking him home they followed the cross-walk to the sidewalk; that there was nothing on the cross-walk but the stone; that there was. no light or guard of any kind there; that there was a lantern on a tool box on the east side of the cross-walk running south on Blue Earth street; that there was another red lantern on the southwest corner of the same intersection; that he knelt down on the stone that night and saw it again next morning; that he did not see any red light on the stone that night.

Gladis Fox testified that she went down to the place of the accident

with her father; that it was very dark. In all other respects she corroborated her father's testimony.

Mrs. Granlund testified that she passed along the east side of Crystal street and across Blue Earth street on the cross-walk at about 7 o'clock in the evening in question; that it was very dark and that the street lamp was not lit at that time. She otherwise corroborated the testimony of the plaintiff and Mr. Peterson.

The testimony made contributory negligence on the part of the plaintiff, and negligence on the part of defendants, questions for the jury. The city ordinance has no application to the case, as is contended for by defendants. It was error to direct a verdict in favor of the defendants, for which a new trial should be granted.

Reversed.

IN RE APPLICATION FOR DISSOLUTION OF BLUE EARTH COUNTY CO-OPERATIVE COMPANY.

A. J. WHITMAN & COMPANY v. H. C. MIELKE.1

January 25, 1918.

No. 20,707.

Corporation — purchase of goods — claim against corporation.

1. Claimants sold their stock of merchandise to a co-operative company, agreeing to look only to the proceeds of sales of stock for their pay. Part of the stock was already subscribed and was later paid for, and claimants received the proceeds. *Held*, the contract created no claim against the corporation, unless it was broken by the corporation.

Breach of contract - burden of proof - failure to make finding.

2. Breach of contract was not pleaded. There was some evidence that it was broken and some that it was not. The burden of proof was on claimant. The court made no finding on this subject and was not asked to do so. It is not the province of this court to make findings on conflicting evidence, nor on such evidence to direct the trial court what findings to make. The issue of breach of contract is not in the case as presented on this appeal.

¹Reported in 166 N. W. 178.

In the above entitled matter H. C. Mielke, receiver, filed objections to the claim of A. J. Whitman & Company for \$2,022.40. The matter was heard in the district court for Blue Earth county before Comstock, J., who made findings and disallowed the claim. From an order denying its motion for a new trial, claimant appealed. Affirmed.

- C. J. Laurisch and S. B. Wilson, for appellant.
- H. L. & J. W. Schmitt and U. G. Argetsinger, for respondent.

HALLAM, J.

In 1907 claimants, A. J. Whitman & Company, were owners of a general merchandise business in the village of Good Thunder. November 20, 1907, they made a written proposition "to the people of Good Thunder and vicinity," in which they stated that if 20 or more persons would subscribe each \$100 and become incorporated as the Blue Earth County Co-Operative Company, with by-laws recommended by the Right Relationship League of Minneapolis, claimants would "turn over" to the corporation so formed their entire stock of merchandise, the value or price to be determined by appraisement, and to be paid as follows: There should be credited on the books of the corporation a number of shares of capital stock equal to the agreed purchase price, said amount to remain so credited until reduced and finally canceled by the sale of additional shares of stock, and, as such shares were sold and paid for, the proceeds to be paid to claimant in reduction of the credit. It was stipulated that neither the corporation nor the board of directors nor members should incur or assume any liability by authorizing the credit, but should "sell shares as rapidly as possible."

The court found that some 40 persons subscribed stock and incorporated the Blue Earth County Co-Operative Company, and that claimants' proposition was accepted by the corporation. The evidence sustains these findings. The merchandise was appraised at \$6,277.72 and was transferred to the corporation. Business was commenced with claimant Whitman as business manager. Stock was sold to the amount of \$4,255.32, leaving unpaid \$2,022.40. After some years the corporation became insolvent. A receiver was appointed and claimants presented their

claim for the above balance of \$2,022.40. The trial court disallowed the claim and claimant appeals.

The trial court was right.

- 1. The contract was a valid one. At the time it became effective, a substantial part of the consideration had been subscribed, and this was later paid over to claimants. No reason is suggested against the validity of the agreement of claimants to look only to the proceeds of sales of stock for the balance due them, and to make no personal claim against the corporation or its members. The corporation is not liable unless it, in some manner, broke its contract.
- 2. There is no allegation in the pleadings of any breach. There was some evidence to the effect that the corporation made no effort to sell stock, and the claim is now made that there was a breach on its part of its agreement to "sell shares as rapidly as possible." The fact is Whitman, one of the claimants, was manager of the corporation. There was evidence on behalf of the receiver that there was a bona fide effort by the corporation to sell stock. The court might have so found. The court made no findings on this subject and was not asked to do so. claimants sought to predicate their claim on a breach of contract, the burden was on them to prove the breach. If the trial court omitted to make findings on this issue, it was incumbent on them to ask that findings be made. It is not the province of this court to make findings on conflicting evidence, nor, on such evidence, to direct the trial court what findings to make. Lawton v. Fiske, 129 Minn. 380, 152 N. W. 774. The issue of breach of contract is not in the case as presented by this appeal. Flanigan v. Pomeroy, 85 Minn. 264, 267, 88 N. W. 761. The contract being valid, and no breach established, claimants have no claim.

Order affirmed.

J. F. MUSHEL v. C. G. SCHULZ AND OTHERS.1

January 25, 1918.

No. 20,755.

State aid for schools --- appropriations.

1. State legislatures prior to 1917 provided that public schools of certain designated classes, upon reaching certain specified standards. should receive stipulated amounts annually from the state, and that appropriations made for that purpose, if insufficient to pay all demands in full, should be distributed pro rata. Appropriations made from time to time left a deficit up to July 31, 1916.

Same.

2. The legislature of 1917 appropriated an amount for state aid available for the year ending July 31, 1917, and an amount available for the year ending July 31, 1918.

Construction of statute.

3. In construing a statute, we may, in case of doubt, take into account the object or purpose of the act, the events leading up to it, the history of the passage of the act through the legislature and modifications made during its course.

State aid for schools - 1917 appropriation not for deficit in prior years.

4. Construing this statute in the light of its history and circumstances, and in connection with other legislation, it is held it appropriates money for use in payment of aid accruing during the specific years mentioned and does not authorize payment, out of the amount appropriated, of a deficit accruing prior to those years.

Action in the district court for Ramsey county by a resident and taxpayer of Benton county against the superintendent of education, the treasurer and auditor of the state of Minnesota to restrain defendant superintendent from executing any certificate of the amount to go to any schools for special state aid for the school year ending July 31, 1915, or that ending July 31, 1916, to make up any deficit for either of those years, and to restrain defendant auditor and treasurer from

¹Reported in 166 N. W. 179.

issuing or paying any warrant for the same to be paid out of the appropriation made by the legislature for the school year ending July 31, 1917, or that ending July 31, 1918. From orders overruling their demurrer to the complaint and granting a temporary injunction, Brill, J., who certified to the supreme court the questions presented by the demurrer, defendants appealed. Affirmed.

Lyndon A. Smith, Attorney General, and Clifford L. Hilton, Deputy Attorney General, for appellant.

Harris Richardson, for respondent.

HALLAM, J.

1. Some years ago the state legislature adopted the policy of state aid to public schools which should attain certain prescribed standards. Statutes embodying this policy have been passed by successive legislatures. G. S. 1913, §§ 2927-2948.

Chapter 296, p. 416, Laws 1915, contains the last modification of such statutes. It provides that schools of certain designated classes, upon reaching certain specified standards "shall receive" certain stipulated amounts annually from the state. These statutes created an obligation on the part of the state to the school districts meeting the requirements, but an obligation not enforceable without further legislation, for these statutes carry with them no appropriation. Appropriations were made from time to time, but the appropriations made by the appropriation acts have not been as large as the obligations created by the other set of statutes. As a result, when the 1917 legislature convened, all appropriations made up to that date had been used and still there was an amount unpaid accrued during the fiscal years ending July 31, 1915, and July 31, 1916, of \$1,070,193.

2. The legislature of 1915 (c. 356, p. 485, Laws 1915), established a biennial budget system by which every state officer, under whose direction any public money is spent, is required to submit to the Governor not later than December 1 preceding a session of the legislature, a complete estimate of the amount needed in his department "during each year of the ensuing biennial period," and the Governor is required to assemble all such estimates and lay them before the legislature.

On December 11, 1916, the superintendent of education reported his estimate of the amount needed for the biennial period ending July 31, 1919. He reported also the then existing deficit of \$1,070,193.

Thereupon the House and Senate passed an appropriation bill, chapter 437, p. 664, Laws 1917. By the terms of this bill as passed by both houses, there was appropriated:

"For aid to * * * schools * * * available for the year ending July 31, 1917, \$2,637,545.00."

"For aid to * * * schools * * * available for the year ending July 31, 1918, \$2,400,000.00."

"For aid to * * * schools * * * available for the year ending July 31, 1917, only, \$1,070,193."

The last item was vetoed by the Governor. The other two items stand in the appropriation bill as passed.

The defendants, state officers, now claim the right to pay the deficit of \$1,070,193 arising prior to July 31, 1916, out of the \$2,637,545, appropriated "for aid to * * * schools * * * available for the year ending July 31, 1917." Plaintiff, a taxpayer, denies their right to do so, and claims this appropriation can be used only to pay amounts accruing during the year ending July 31, 1917. The trial court sustained this contention, overruled a demurrer to plaintiff's complaint and enjoined the use of this appropriation for payment of any deficit accruing prior to July 31, 1916.

The position of the defendants, stated more at length, is, that an appropriation of funds "available" for a certain fiscal year is not an appropriation for payment of obligations incurred or accruing during that year, but that it creates a fund which may in whole or in part be expended during that year "for the specified general object, irrespective of when the obligation was incurred," and that an appropriation available for the fiscal year ending July 31, 1917, simply places the money so appropriated at the disposal of the state officers to be used for the specified general object without reference to time of accrual of the obligation paid, and may accordingly be used to pay obligations accruing during the prior fiscal years 1915 and 1916. We do not concur in this contention.

3. The question presented involves simply a construction of the meaning of the words used in the 1917 statute. In determining the proper

construction of a statute, we may, in case of doubt, take into account the object or purpose of the act (Washed Sand & Gravel Co. v. Great Northern Ry. Co. 130 Minn. 272, 153 N. W. 610); the events leading up to it (Funk v. St. Paul City Ry. Co. 61 Minn. 435, 439, 63 N. W. 1099, 29 L.R.A. 208, 52 Am. St. 608); the history of the passage of the act through the legislature (Seven Cases v. U. S. 239 U. S. 510, 36 Sup. Ct. 190, 60 L. ed. 411, L.R.A. 1916D, 164; Connole v. Norfolk & W. Ry. Co. (D. C.) 216 Fed. 823; Tucker v. Williamson (D. C.) 229 Fed. 201; U. S. v. Poland, 231 Fed. 810, 145 C. C. A.630); and modifications made during its course (State v. McCollister, 11 Ohio, 46, 55).

4. Giving the words used their ordinary meaning, an appropriation "for the year ending July 31, 1917," seems to us to intend an appropriation for the current expenses of that year or to defray the obligations of that year. The use of the word "available" for that year does not seem to us to convey any different meaning. This word runs through all the appropriation acts for that year, and, as generally used, we cannot see that it conveys any such intent as defendants claim for it, or that it, in fact, materially adds to or detracts from the other language used.

The construction indicated in the above paragraph is not negatived, but is emphasized by the circumstances and the history of the act.

The statutes creating the right to state aid provide in substance for an annual apportionment or pro rating of any appropriation made, if it is insufficient to pay all demands in full. For example, G. S. 1913, § 2945, provides: "The state superintendent shall annually apportion to such semi-graded and common schools as he shall find entitled to state aid, the amount appropriated for such schools, in equal amounts to all schools of the same class." Section 2933 contains similar provisions for apportionment of amounts appropriated for high schools and graded schools. This requirement of an annual pro rating of the appropriation is inconsistent with the theory that these appropriations are made at large and without limitation as to particular years, and is likewise inconsistent with the idea that the demands of any year are to be paid in full out of funds later appropriated if the annual appropriation is insufficient therefor.

This construction is also emphasized by the fact that the bill, as it

passed both houses, contained a specific appropriation of \$1,070,193, the exact amount of the deficit. The incorporation of a specific item for the exact amount of the deficit is indicative of an intent that that item should be applied to payment of the deficit, but it also negatives any intent that the deficit should be paid out of any other item included in the appropriation bill.

It is true, the item of \$1,070,193 was included by the use of language substantially the same as used in the item of \$2,637,545. But to this it may be said: The ordinary meaning of the language in both cases, if taken alone, is to make an appropriation for the purposes of the year ending July 31, 1917. It may be that if the item of \$1,070,193 had been approved by the Governor and so enacted into law, an intent could be found that the amount appropriated by it, being in the exact amount of the deficit, should be applicable to the payment of the deficit, but, if such result could be reached, it would be because the ordinary meaning of the language must be made to bend to a palpably plain purpose, shown by extraneous circumstances. We have no such impelling consideration in construing the items of \$2,637,545.

There is some contention by defendants that the language of this appropriation is susceptible of a construction that the funds made available for a given fiscal year were to pay the aid "earned" during the prior school and fiscal year, so that funds available for the fiscal year ending July 31, 1917, were appropriated to pay aid earned in the school and fiscal year ending July 31, 1916. This contention is based, in part, on the fact that the aid earned during the year ending July 31, 1916, is not required to be certified by the state superintendent before the first day of October following, and partly on an alleged practical construction by which it is said state aid has been paid out on that principle in past years. Whether this practice was proper, under prior appropriation acts, is a question not before us, and we do not consider it. The language of prior acts differs in some particulars from this one. It is very apparent that no such construction of the 1917 act is possible. This act, in terms, makes express reference to distribution "for the school year beginning August 1, 1917," that is, the year ending July 31, 1918. From this, it is clear that the appropriation was intended to cover the biennial period ending July 31, 1918. Taking all these statutes together,

this legislative purpose seems plain: To declare the standard upon which public schools are entitled to state aid and the amount to which they are entitled; then to make appropriations fixing the amount to be used for such purpose for each year with the intent that, if the appropriation falls short, the amount shall be ratably distributed, any deficit to be left to future legislatures to deal with as they see fit. We hold therefore that the appropriation act of 1917 appropriated money for use only in payment of demands for state aid accruing during the years mentioned in the act and did not authorize payment, out of the amount appropriated, of a deficit accruing prior to July 31, 1916. The injunction was therefore properly ordered and the demurrer properly overruled.

No statutory costs will be allowed.

Orders affirmed.

Brown, C. J. (dissenting).

In my view of this controversy, the distribution of the money in question may safely be left to the high school board, to be made in harmony with the apportionment provided for by law. With the few new districts, those organized subsequent to and which have relied upon the school aid appropriation of 1917, properly taken care of, which readily may be done, it would seem of no special importance whether the money reaches the other districts under the label "deficiency appropriation" or "appropriation for the year 1917." In either case the money will be devoted to the same purpose, namely, the advancement of the educational interests of the districts receiving the same. There may and probably will be a deficiency, but that will be a matter for future legislation. The order appealed from should be reversed and the cause remanded with directions accordingly.

QUINN, J.

I concur with the Chief Justice.

CITY OF RED WING v. WISCONSIN-MINNESOTA LIGHT & POWER COMPANY.1

January 25, 1918.

No. 20.788.

Gas - change of rate - arbitration under franchise.

1. The provisions for arbitrating the rates to be charged by defendant, the holder of a franchise contract, for furnishing the city of Red Wing and its inhabitants with gas apply to the rates to the private consumers as well as to the municipality.

Injunction -- city interested party against breach of franchise.

2. The city has an interest in maintaining the arbitration provision of the franchise in behalf of its inhabitants for whom it acted when granting the franchise; and, since the right of the city and its inhabitants to relief rests upon common ground, this action will lie if there be a threatened breach of the contract as to the gas consuming inhabitants, for thereby a multiplicity of suits is avoided.

Action in the district court for Goodhue county to restrain defendant from putting into effect increased gas rates. From an order, Johnson, J., granting a temporary injunction, defendant appealed. Affirmed.

Brown, Abbott & Somsen, for appellant.

Charles P. Hall, for respondent.

HOLT, J.

In 1872 certain persons obtained an exclusive franchise from the city of Red Wing to establish a gas plant therein and lay the necessary pipes or mains in its street, for the purpose of supplying the city and its inhabitants with gas. The duration of the franchise was 40 years, with 20 years additional, unless the city elected to buy the plant. Defendant now holds this franchise. In June, 1916, a schedule of rates for gas, effective on and after July 1, 1916, was proposed by defendant and accepted by the city council. On September 7, 1917, defendant notified the

¹Reported in 166 N. W. 175.

city council that these rates so established by agreement would be increased 10 per cent on and after September 15, 1917. Thereupon the city brought this action to enjoin defendant from putting the increased rates into effect, claiming that under the terms of the franchise defendant could not change the rates established by agreement, except with the consent of the city council or as a result of an arbitration. Issue was joined and, on motion, the court restrained defendant pendente lite from increasing the rates of July, 1916. Defendant appeals.

The order rests solely upon the pleadings and the franchise ordinance therein referred to. The here material portions of the ordinance are contained in sections 3 and 4 thereof, which read as follows:

"Sect. 3. That said persons hereinbefore named, their heirs, executors, administrators and assigns, and the city council of the city of Red Wing may contract for and make regulations relating to the lighting of said city with gas in such manner as may be agreed upon. And they may make generally such contracts in relation thereto as may be beneficial to the said respective parties. In case the said persons, or their representatives and assigns, and the city council of the city of Red Wing cannot agree on the price to be charged for gas by said persons from time to time, then it shall be left to the arbitration and award of three disinterested persons to fix and determine said price. The said persons, their representatives and assigns shall, whenever notified so to do by the city council of said city, select one person to act as arbitrator, and the city council of said city one person for such purpose, and the two so selected shall choose a third, and said three arbitrators shall, with all convenient dispatch, proceed to hear the proofs and obligations of the parties and shall thereupon name and fix a price by report in writing, which shall be paid by said city for the use of gas for such time as may be agreed upon and submitted to arbitration and not less than one year. In case any of the parties selected should decline or neglect to act, the party selecting the person who declines, may select another or others until arbitrators can be found who will act and the determination of such arbitrators shall be binding on both parties for the term submitted. During the pendency of such arbitration, the said persons shall furnish gas and receive as compensation therefor the amount fixed by said arbitrators.

"Sect. 4. The said persons or their assigns shall commence the construction of their works within six months from the passage of this ordinance and shall, within eighteen months from the passage thereof, have not less than a mile and a half of pipe laid in said city of Red Wing, and gas works erected and be ready in all respects to furnish gas to those applying for it and shall furnish gas to the corporation or citizens of said city, whenever and wherever required, to the extent to which said persons, their heirs, executors and assigns may have their pipes laid at rates on an average not exceeding the prices charged by gas companies in other cities in the state of Minnesota, regard being had to freight and charges for materials for the manufacture of gas. In case of disagreement between said persons and city council of the city as to the price to be charged for gas to said corporation, the same shall be fixed as provided in section 3 of this ordinance."

The rights of the litigants are based solely upon the contract evidenced by the ordinance, and not upon any rate making power delegated to the city. It is not questioned, and could not well be, that in a franchise ordinance rates and the manner of fixing them, both for the city and its inhabitants, could be provided for, subject to the right of subsequent leg-The main contention of defendant is that the islative interference. arbitration provision in the two sections applies only to rates for gas used by the municipality and not to that supplied for private use. Therefore, it is argued that, since the answer avers a readiness to arbitrate the rates to be charged the city, no ground exists for enforcing arbitration by injunction; and, since the only basis for relief against the increased rates, fixed by defendant to private consumers, must be predicated upon the provision, in section 4, that such rates must not exceed the average price charged by gas companies in other cities of the state, and since the allegation of the complaint, in respect to such increased rates exceeding the average rates in other cities, is not positive but upon information and belief, the temporary injunction should not have been granted. There is a further claim in connection with this average rate clause, that it is so indefinite and unworkable as to be unenforceable.

There is no intimation of lack of authority in the city council to grant the franchise here involved. It is manifest that, in granting the same, benefits and privileges were intended to be secured not only to the

municipality itself, but to its inhabitants as well, that is, to those who in the future might desire to use gas. Hence, naturally, we look for provisions in the franchise guarding or protecting all consumers against an arbitrary fixing of gas prices by defendant. On examination of section 3 it is clear that, as to the rate to be charged the city for municipal or public purposes, it must be fixed by the arbitration therein specified, unless voluntarily agreed to between the city council and defendant. Fairly construed this section covers all gas used by the city, street lighting as well as other possible uses. Section 4 consists of two sentences, the first of which is awkward both as to form and thought. But the intent is clear enough, namely, to assure, within a specified time, gas to those applying for it at an average rate not exceeding prices charged by gas companies in other cities of the state. Then follows the sentence with a provision for arbitration in case of disagreement. The whole of section 4 should be held to relate exclusively to the rate and the method of ascertaining the same to private consumers, for the rate for municipal use and its determination has already been provided for under section 3. Nowhere in the ordinance is the word "corporation" found except in section 4, and where it first occurs it, apparently, is defined as referring to the citizens of Red Wing. The same meaning should be given the word "corporation" in the last sentence of the section. Given that meaning, we have no unnecessary repetition of the arbitration provision for the benefit of the city, but the arbitration of section 4 is to determine the rate to private consumers. The use of the word "corporation" to designate the inhabitants of Red Wing in the ordinance may here have been unfortunate as tending to create a doubt or ambiguity. But we find an' excuse for such use in the first section of the charter as it existed when this franchise was drawn, which reads: "All that district of country in the county of Goodhue contained within the limits and boundaries hereinafter described, shall be a city by the name of Red Wing, and the people now inhabiting, and those who shall hereafter inhabit within the district of country herein described, shall be a municipal corporation." Here the municipal corporation is synonymous with the inhabitants of Red Wing.

We are not unmindful that a construction might be given, whereby section 3 would relate to street lighting only, and section 4 to other use

of gas by the city and to the use thereof by private consumers. But where, in a franchise, the interests of the public are involved, doubts and ambiguities must be resolved in favor of that construction which is most advantageous to the public. Unquestionably the fixing of rates by the arbitration provision is of a substantial advantage to the public. It fixes the rates for a definite time in the future. This courts cannot do. The clause providing for a rate not exceeding those in other cities in the state appears, to us, to merely point to the standard which the city council, the arbitrators, or the courts, as the case may be, should apply in determining what is a fair rate, in other words, the reasonable or market value of gas is to govern. So considered the provision, if of any real importance, does not seem to us invalid under the following cases relied on by appellant, viz.: City of Des Moines v. Des Moines Waterworks Co. 95 Iowa, 348, 64 N. W. 269, and City of Denver v. Denver Union Water Co. 41 Colo. 77, 91 Pac. 918. Both relate to waterworks and the furnishing of water, wherein a comparison between different localities with a view of obtaining a standard for rate fixing is much more difficult than in the case of gas plants. In the first case the arbitrators were to ascertain the average rates paid in other cities of the United States having efficient waterworks and it was held ineffective as being impossible of ascertainment. In the last named case the provision was sustained insofar as it related to an average of the meter water rates in the three cities specified in the ordinance and was held inoperative only as to supplying water through fire hydrants. In neither case was there present the important item bearing upon the reasonableness of the rate contained in the Red Wing ordinance, to-wit, that regard should be had for freight and charges for materials for the manufacture of the commodity to be supplied, which virtually reduces the provision to a direction to ascertain the reasonable value of gas to consumers.

Construing this ordinance as we do, many of the technical objections raised against the propriety of granting a temporary injunction vanish. We need not consider whether the allegation on information and belief that the proposed increase exceeds the average rate charged for gas in other cities is sufficient to support the order when met by a positive denial. The controlling feature is whether the defendant may fix rates for private consumers without the consent of the city council and without arbitration.

It is plain from the pleadings and from the position taken in this court, that the professed readiness of defendant to arbitrate is only in respect to gas furnished the city for public use, and not to that furnished the several inhabitants thereof. Indeed, defendant positively denies that the consent of the city council or the determination of arbitrators can interfere with the increased rates established by it. In this situation we think the omission of an averment in the complaint that defendant had been notified by the city council to name an arbitrator, as prescribed by section 3, should not be held fatal; for it is evident that, had the notice been given, it would have been ignored. The real issue upon which defendant plants its defense is the claim that the arbitration provision does not apply to the fixing of rates for private consumers. And we think the court below had a right to consider the probable outcome of that issue in deciding whether the motion for a temporary injunction should be granted or denied.

The city of Red Wing represented not only the municipality but its several inhabitants in making this franchise contract. And in bringing this action to enforce that contract as to a provision thereof which defendant repudiates while holding on to the others, the city acts not only as a municipality but as a sort of trustee for its inhabitants. It is also clear that this one action will avoid the many suits that might be necessary in case each consumer of gas was left to seek redress in an action for damages, were an illegal rate suffered to be established by defendant. All the objections urged by appellant to the maintenance of this action are ably answered and refuted in Muncie Natural Gas Co. v. City of Muncie, 160 Ind. 97, 66 N. E. 436, 60 L. R. A. 822. See also St. Mary's v. Hope Gas Co. 71 W. Va. 76, 76 S. E. 841, 43 L. R. A. (N. S.) 994. Between the city and the private gas consumers of its inhabitants there exists a common interest to relief against defendant, based on the arbitration provision of the franchise. We conclude that that relief may properly be sought in this action, thereby avoiding a multiplicity of suits by the private consumers to redress the threatened wrong.

The order is affirmed.

CARRIE E. SUITS v. ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA.¹

February 1, 1918.

No. 20.677.

Mailing and receipt of letter - finding sustained.

1. The trial court did not err, upon the evidence stated in the opinion, in finding that a letter offered in evidence by defendant was not mailed to or received by the person to whom it was addressed.

Same — when presumption of receipt applies.

2. The presumption that a properly mailed letter will in the due course of mail reach the person to whom it is addressed has application only where the act of mailing is unquestioned or conclusively shown.

Benefit insurance — delayed payments — waiver of by-law.

3. The practice and custom of defendant, an accident benefit insurance association, in permitting and receiving from its members the payment of dues and assessments after the due date thereof, held, following Mueller v. Grand Grove U. A. O. D. 69 Minn. 236, not only a waiver of the failure to pay within the time fixed by the laws of the order, but also a waiver of the by-laws declaring a forfeiture for the default and an estoppel to invoke the same in an action on the contract.

Same — reinstatement of suspended member — by-law inapplicable.

4. The provisions of the laws of the association limiting its liability, where a suspended member has been restored or reinstated to good standing, to injuries thereafter suffered, have no application where no suspension was declared, or where a suspension, occurring automatically by reason of the default, has been waived by the association.

Action in the district court for Lyon county to recover \$6,300 upon an accident insurance policy. The answer alleged that at the time of the death of plaintiff's husband and long prior thereto he had failed to pay his dues and was not a member of defendant in good standing. The case was tried before Olsen, J., who made findings and ordered judgment in

¹Reported in 166 N. W. 222.

favor of plaintiff. From an order denying its motion for amended findings or a new trial, defendant appealed. Affirmed.

Kerr, Fowler, Schmitt & Furber, for appellant. Robinson & English, for respondent.

Brown, C. J.

Action to recover upon an accident insurance policy in which plaintiff had judgment, and defendant appealed from an order denying its motion for an amendment of the findings of the trial court or a new trial.

Defendant is a mutual benefit accident insurance association organized under the laws of the state of Ohio, and, through local or subordinate councils, conducting its insurance business on the assessment plan in that and other states including South Dakota and Minnesota. The company possesses and exercises the power and authority usually granted by law to like associations. Its insurance contracts are formed through the local councils where applicants are received into membership in the association, subject to the laws, rules and regulations imposed by the grand council. Its revenues are derived wholly from dues and assessments levied upon the members and these are collected through the administrative officers of the local councils.

It appears without dispute that David M. Suits was received into the association and became a member of Local Council No. 111, located at Huron, South Dakota, on May 28, 1900. The usual certificate of membership was issued to him, and defendant thereby became obligated, in the event the insured lost his life solely by accidental means, to pay the beneficiary therein named, plaintiff herein, who was his wife, the sum of \$6,300. On March 28, 1915, the insured lost his life by accidental means, and thereby defendant became liable for the full amount of the policy, unless the membership of insured and all rights under the contract were, prior to the accident, terminated and forfeited by his failure to pay an assessment and certain dues which fell due about a month prior to his death. The dues and assessment so in default were due on February 24, preceding the death, and the failure to pay the same is not questioned, and defendant by its answer interposed the default in defense to the action. Plaintiff in reply alleged a waiver of the default by a practice and custom of defendant during the preceding years of accepting and receiving dues and assessments from members, including decedent, at irregular periods after the due date thereof and not insisting upon a forfeiture as declared by the laws of the order. The trial court found that defendant waived the default and was estopped to insist upon a forfeiture, and judgment was ordered for plaintiff.

The assignments of error present two questions, namely: (1) Whether the court erred in denying defendant's motion for amended findings; and (2) whether there was a waiver of the forfeiture resulting from the failure to pay the dues and assessments referred to at or prior to the due date thereof.

1. It appears without substantial dispute that for several years prior to July, 1914, it had been the custom and practice of the association, acting through the local council of which decedent was a member, to overlook defaults in the payment of assessments and dues, and to accept and receive them at irregular periods of delinquency, without any attempt to enforce the by-laws declaring a forfeiture. The custom was recognized as detrimental to the best interests of the association and an attempt was made in July, 1914, to bring it to an end. With that purpose in view the local council of which decedent was a member formally ordered and directed the secretary thereof to notify all members that in the future the constitution and laws of the order must be complied with, payments of dues and assessments made within the time thereby required, in default of which the delinquent members would be suspended, and rights under the insurance contract forfeited as by such laws provided. In compliance with that order the secretary prepared a circular letter, stating therein that by order of the council the "practice of the secretary, in carrying members who had not remitted for their dues and assessments, must be discontinued," and that in the future the laws would be enforced and suspensions ordered when not complied with by the members.

It is contended by defendant that this letter was mailed to and received by each member of the local council, including decedent, and that it effectually terminated the practice of overlooking defaults, and fully restored the operation of the laws requiring a punctual payment of dues and assessments. It may be conceded that if the letter reached decedent it terminated the objectionable practice and restored the effectiveness of the laws of the order. But the court found that the letter was not mailed to or received by decedent. If the finding is sustained there is an end of this branch of the case, and there was no error in the refusal to amend or change the finding on defendant's motion.

The cause was submitted to the court below upon an agreed statement of facts in which, among other things, it was stipulated that if the secretary of the local council were present and sworn as a witness in the cause, he would testify that he prepared the letter pursuant to the directions of the council, and on the fifteenth of July, 1914, according to his best belief, inclosed copies thereof in envelopes properly addressed to all members of the council, including decedent, mailing the same with the postage duly paid for the usual transmission and delivery by the postal authorities; that each envelope was indorsed on the face thereof with return directions, and that the one mailed to decedent was never returned. That the witness would further testify that he had no particular recollection of mailing the particular letter to decedent, but he believes that he did so because of his habit and custom of mailing all letters and notices to each member of the council. It was also stipulated that decedent was a methodical man, and that plaintiff, his wife, would testify that it was his practice to call her attention to his correspondence; that her attention was at no time called to a letter of the character of the one here in question, and that after the death of decedent the letter was not found among his papers, and plaintiff believes that no such letter was ever received by him.

The evidence, or what would have been evidence had the witnesses been called and examined on the trial, leaves the question whether the letter was mailed to and received by decedent in some doubt. But after careful consideration of the matter we conclude that the findings of the court thereon should not be disturbed. The findings are not clearly against the evidence. Such has been the conclusion of other courts upon substantially similar evidence. Payn v. Mut. R. Assn. 2 How. Pr. (N. S.) 220; Molloy v. Supreme Council, 93 Iowa, 504, 61 N. W. 928; Jackson v. Northwestern Mut. R. Assn. 78 Wis. 463, 47 N. W. 733. The proposed testimony of the secretary of the local council tends strongly to sustain the claim that the letter was properly mailed to decedent, but is not conclusive. Hastings v. Brooklyn Life Ins. Co. 138 N. Y. 473, 34 N. E. 289; Supreme Lodge v. Johnson, 78 Ind. 110. The presumption that

a properly mailed letter will reach the person to whom addressed (Backdahl v. Grand Lodge A. O. U. W. 46 Minn. 61, 48 N. W. 454), has application only when the act of mailing is unquestioned or conclusively established. The fact that subsequent to the date of the letter decedent paid certain dues to the secretary of the association in advance, and the further fact that the circular letter suggested that all members do so, though in a measure significant, as tending to show the receipt of the letter by decedent, are not conclusive. We are not justified in assuming that no other such payments were ever made by him. The record is silent upon the question.

2. The constitution and laws of the association contain various provisions upon the subject of dues and assessments and the payment thereof, declaring the effect of a failure to pay within the time fixed therefor, all of which are here of no special importance except section 3 of article 7, which treats of the delinquency of insured members, as distinguished, as we understand the matter, from those who are members without insurance. The section provides that, if any insured member fails to pay any or all of the dues and assessments levied against him when and as the same become due, he shall immediately on the happening of such default become delinquent and cease to be in good standing as such insured member, and he and every person claiming by, through or under his certificate of insurance "shall be suspended from any and all rights to indemnity or benefits." The section further provides: "Should such delinquent member at any time regain his good standing as an insured member in the order his restoration thereto shall in no wise operate to entitle him or anyone claiming * * * under him * * * to indemnity or benefits on account of any accident or injury received by him while not in good standing."

It is contended by defendant that by these provisions of the laws of the order the failure to pay assessments when due operates automatically to suspend the member in default, and that the only effect to be given the act of paying delinquent dues, and the act of the association in accepting them, is to restore the member to good standing, subject to the limitation that restoration to good standing shall not entitle a member or those claiming under his certificate to indemnity for injuries received during the period of suspension. And upon this ground defendant seeks to dis-

tinguish the case from Mueller v. Grand Grove U. A. O. D. 69 Minn. 236, 72 N. W. 48, and other like cases. We are unable to concur in that view of the case. While the automatic suspension cannot be questioned, the association laws are specific in that respect, it is clear that the provisions limiting the rights of suspended members on restoration to good standing are inapplicable to the facts here presented.

The right of voluntary restoration by the payment of delinquent dues is not given, and the provisions of the constitution upon which defendant relies, properly construed, can have application only to such members as have been restored to membership and to good standing in the manner expressly provided for and permitted by the laws of the order. So far as we are informed by the record there is but one method of such restoration, either provided for or recognized by the association, and that is by petition to and favorable action by the local council of which the petitioner is a member. A restoration to good standing effected in that manner is subject to the reservation of nonliability for injuries received by the insured during the period of suspension. But the record before us furnishes no suggestion that decedent had ever been suspended, or that he ever applied for restoration to good standing in the order. He was at no time treated by the association as under suspension, and his delinquent dues were accepted without intimation on its part that he was either in default or not in good standing. In this situation of the case the contention of defendant cannot be sustained. It is probable that in a given case the payment of delinquent dues and the acceptance thereof by the association might be treated as an application for reinstatement in the order, notwithstanding the existence of an otherwise expressly prescribed method of restoration. But such effect cannot be given the payment and acceptance shown in this case. It does not appear that the association ever permitted restoration to good standing other than in the manner expressly provided by its laws. In this respect the case comes within the rule applied in Leland v. Modern Samaritans, 111 Minn. 207, 126 N. W. 728; and Villmont v. Grand Grove U. A. O. D. 111 Minn. 201, 126 N. W. 730, where on similar facts it was held that the question whether the payment of delinquent dues and assessments was for the purpose of gaining restoration to good standing in the order, or for the purpose of maintaining an existing good standing was one of fact. In those cases it ap

peared that the by-laws there before us gave to suspended members the right to reinstate themselves by voluntarily paying all delinquent dues. No such right appears in this case. The payments by decedent, therefore, are to be attributed to a purpose of maintaining a recognized existing good standing, rather than for the purpose of regaining lost rights. Reisz v. Supreme Council, 103 Wis. 427, 79 N. W. 430.

The case differs from Ward v. Merchants L. & C. Co. infra, page 262, 166 N. W. 221. In that case there was a provision of the contract expressly limiting the effect to the acceptance of an overdue assessment. No such provision is found in the contract in this case.

It follows that the case is controlled by the rule laid down in Mueller v. Grand Grove U. A. O. D. supra. Defendant waived the default of decedent to pay the dues and assessments in question, and by the acceptance thereof estopped itself from invoking the forfeiture. The case of Gagne v. Massachusetts B. & Ins. Co. (N. H.) 101 Atl. 212, sustains our decision in the Ward case, but is not in point in this case.

Order affirmed.

EMMA E. ABERNETHY v. JAMES A. HALK AND ANOTHER.1

February 1, 1918.

No. 20.678.

Exchange of property — fraud — specific performance — loss of title by abatement proceeding.

In an action for specific performance of a contract for the exchange of properties the defense was that plaintiff by false and fraudulent representations induced the deal. The court found this defense not proven. The title to part of the property which plaintiff agreed to transfer had been seized in an abatement proceeding, but was being used in the business which defendant Halk received from plaintiff. After Halk learned of the proceeding he nevertheless remained in the undisturbed possession of the property transferred to him for more than two months, and abandoned it on the day the title was perfected by plaintiff. It is held:

¹Reported in 166 N. W. 218.

- (1) Halk was not entitled at that time to rescind, the contract not having been induced by fraud.
- (2) No error occurred in excluding evidence on matters not in issue, nor in refusing amendments to the answer during the trial which might raise new issues.
- (3) An abatement proceeding does not eliminate the title of a defendant to the property seized therein until the entry of a decree to that effect, and it is not unlawful for a defendant to contract with reference to such property prior to the decree.
- (4) Other errors assigned upon the rulings of the trial court examined and held to be without prejudice to appellants.

Action in the district court for Ramsey county to obtain from defendant Halk a warranty deed to certain premises, subject to a specified encumbrance. The facts are stated in the opinion. The case was tried before Orr, J., who made findings and ordered judgment in favor of plaintiff. From an order denying their motion for a new trial, defendants appealed. Affirmed.

James Manahan and J. D. Hoogesteger, for appellant. William G. White, for respondent.

HOLT, J.

The action is for specific performance of a written contract between plaintiff and defendant Halk, whereby the latter agreed to convey certain land in Pennington county, South Dakota, in consideration of the transfer and delivery to Halk of the household goods, furniture and good will of the business as conducted in a double rooming house known as Nos. 143 and 145 West Fifth street, St. Paul. The trial resulted in a decision granting plaintiff the relief asked. Defendants appeal from the order denying a new trial.

The main contention of defendants on this appeal is that the facts found do not authorize a decree for specific performance, for the reason that plaintiff did not own part of the furniture she agreed to transfer to Halk, and that the contract was illegal. The findings of fact are not challenged by any assignment of error, except in an unimportant particular. The decision of the trial court must therefore stand, unless the facts found do not support the conclusion of law or some erroneous ruling affecting the result occurred on the trial.

The evidence discloses these facts: In November, 1914, while one Edna Brooks was conducting a rooming house in the easterly part, or No. 143, of the double house mentioned and owning the household goods and furniture therein, an abatement proceeding was instituted by the state against the premises occupied by her. The owner of the building was made a party but was not served with process, being a nonresident. Edna Brooks defaulted. Her said personal property was seized by the sheriff, and stored in a room on the third floor of No. 143. In this situation, with nothing further done in the abatement proceeding, plaintiff, in February, 1915, leased No. 143 and opened a rooming house therein. In the first part of the next April she leased No. 145 for the same purpose. This double house had 11 rooms on each side. When No. 145 was leased she needed more furniture. Her son, who transacted all the business, herein referred to as her agent, consulted the county attorney and received permission from him to use the furniture which the This was then taken and distributed sheriff had stored in No. 143. through the various rooms of the whole building, wherein was also the furniture belonging to plaintiff. Plaintiff's agent testified to an agreement with Edna Brooks transferring her interest in the personal property seized by the sheriff to plaintiff for \$225, less what it would be necessary for plaintiff to pay to secure the title that might be acquired through the abatement proceeding. Plaintiff conducted a rooming house in both No. 143 and No. 145 thereafter until August 6, 1915, when possession was taken by Halk under these circumstances: On July 31, 1915, a written contract was executed by plaintiff and Halk, whereby the latter agreed to exchange the land mentioned for the household goods, furniture and good will of the business in this double rooming house. The contract provided that either party should have 60 days within which to perfect the title to the property to be conveyed or transferred. After plaintiff's agent had examined the land, as was stipulated in the contract, he, according to his testimony, informed Halk that plaintiff had no title to part of the furniture, but that it would be obtained in a short time; and that, if Halk wished to consummate the deal, and obtain possession at once, the papers could be made out and left in escrow, to be delivered when the title was perfected. This was apparently agreed to by Halk, for he executed a deed of the land and plaintiff a bill of sale of the

furniture. Both were placed in the hands of defendant Hoogesteger, to be delivered when clear title to all the furniture was in Halk. Halk took immediate possession, and conducted a rooming house in the building until the evening of December 21, 1915, when he left and abandoned the place. The title to the part of the furniture seized in the abatement proceeding was perfected thus: A final decree was, on December 7, 1915, entered dismissing the proceeding so far as the building was concerned but directing the furniture of Edna Brooks to be removed and retained by the sheriff for 10 days and then sold by him. It was not removed or disturbed, but sold by the sheriff on December 21, 1915, to one Somers, acting for plaintiff who paid the purchase price of \$200, and on the following day a bill of sale executed by Somers was delivered to Halk. The court found that Halk first learned of the true nature of the abatement proceeding on October 15, 1915. Thereafter Hoogesteger returned the deed of the land to Halk, but retained the bill of sale executed by plaintiff. Plaintiff took possession of the rooming house after Halk left it, but began this action within a month thereafter. She demanded the deed to the land before suit. The demand was not complied with.

The court found none of the allegations of the answer as to fraudulent and false representations true. The contract of exchange, the execution of which was admitted in the answer, must therefore be held binding. This contract gave either party but 60 days' time to perfect the title to the property to be exchanged, but time was not made the essence of the agreement and could be waived. By the answer and testimony defendants admit that there was a defect in plaintiff's title occasioning the escrow arrangement. It is unquestioned that, on the day Halk abandoned the personal property delivered to him under the contract and the escrow agreement, the title thereto was perfected by plaintiff, who next day delivered to him documentary evidence thereof. We fail to see wherein plaintiff was not then entitled to specific performance of the contract, there having been no fraud in its inception. The learned trial court in the memorandum states that, on learning of the abatement proceeding on October 15, Halk had the undoubted right to surrender the contract This is probably correct, not, however, as appellants contend, on the ground of fraud, but for the reason that the good will of the rooming business which plaintiff had agreed to transfer as well as the use of part

of the household goods were then in jeopardy by the abatement proceeding, and it might have become impossible for Halk to have either used the personal property or the premises at No. 143 West Fifth street for rooming house purposes. But he then elected to retain the contract and take his chances of remaining in the undisturbed conduct of the business. He was not disturbed. And on December 7 the decree in the abatement proceeding removed all obstacle to the continuance of the business, and, as stated, on the day he abandoned the premises perfect title to the property was secured, so that there could be no question that plaintiff was in position to warrant and defend the title thereto according to the covenant in the bill of sale to Halk, held in escrow by defendant Hoogesteger since in August, 1915. There is nothing in appellant's point that Halk need not accept the bill of sale from Somers because he was entitled to plaintiff's covenants as to title. He already had her covenants by her bill of sale in escrow.

We think there is no merit in the errors assigned upon the refusal to the court to receive evidence as to the relative value of the exchange properties. Halk no doubt knew the value of the equity in his South Dakota land and the court found that there was no misrepresentation as to the value of the furniture or good will of the rooming business after hearing evidence respecting the same.

It is true enough that a court of equity may decline to enforce an unconscionable contract. But a defense on that score must be based upon allegations of facts and not upon conclusions. Leave to amend was sought, but amendments of pleadings on the trial are largely within the sound discretion of the trial court and we are unable to see any abuse in the denial of the amendments proffered.

Appellants argue very earnestly that the contract is illegal because it concerns property part of which had been seized in the abatement proceeding. It is said the contract is an attempt to nullify the effect of the abatement statute, and to interfere with the suit to enforce it. We discover no intent to evade the statute or impede its enforcement by this contract. It cannot be said that the institution or pendency of the abatement proceeding forfeited the property seized or terminated Edna Brooks' title thereto. Nor did her failure to answer divest her of ownership. Not until after the state had adduced proof sufficient to sustain the allegations

of its complaint as to the character of the business conducted by her and the use of the property seized could this be done. Surely, there could be nothing unlawful in the plan of plaintiff to acquire this property at the sheriff's sale. The more bidders the better price the state would obtain. Nor was there anything wrong in seeking to acquire the interest of Edna Brooks, for, as stated, the abatement proceeding might fail for lack of proof, in which case her ownership would have remained intact. Strictly speaking, the seizure of personal property under the abatement statute is in the nature of an attachment thereof pending suit, and does not affect the title of the owner thereto until a decree is entered forfeiting the same. We cannot see that it is of any importance to Halk that the county attorney permitted the furniture to be scattered through the house and used during the pendency of the proceeding, or that the sheriff sold it without removal as specified in the decree.

Error is assigned upon the refusal of the court to receive evidence touching what Halk had learned, subsequent to the deal, concerning the desirability of the premises for a rooming house. Since the court failed to find that any false or fraudulent representations were made in respect to the business or property to induce Halk to enter the contract, it follows that what he afterwards learned about it is of no consequence in this lawsuit. Neither is the alleged admission of plaintiff's agent, that he did wrong in selling the Brooks' furniture, material in view of the findings that no misrepresentations were made to bring about the exchange.

Halk was asked: "Why did you stay there after you found it had been condemned or after you understood it was in part at least owned by the sheriff, or had been condemned as a nuisance?" Error is assigned upon the ruling sustaining an objection to the question. This cannot be held reversible error. The court was not advised as to what the answer might be, and moreover the question assumed the situation to be very greatly different from what it actually was.

Neither can Halk ask for a reversal because the decision favors him by not referring to the chattel mortgage to which the contract provides that the transfer of the furniture shall be subject.

Our conclusion is that no prejudicial error is made to appear. Order affirmed.

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PETER HOLM v. GREAT NORTHERN RAILWAY COMPANY.1

February 1, 1918.

No. 20,705.

Appeal and error — proceedings at first trial not reviewable after second trial.

1. Granting a new trial leaves the case as if no trial had ever been had; and upon an appeal from a judgment rendered as the result of the second trial, none of the proceedings at the first trial are before this court for review.

Accident at railway crossing — failure to look and listen contributory negligence.

2. A traveler about to cross a railroad track who fails to use his senses to discover whether a train is approaching is chargeable with contributory negligence as a matter of law.

Same.

3. Plaintiff's evidence shows affirmatively that the deceased must have seen the warning of the flagman, if he had looked, and was chargeable with contributory negligence for failing to do so.

Action in the district court for Traverse county by the administrator of the estate of Arvid A. Holm, deceased, to recover \$7,500 for the death of his intestate. The answer alleged that the death was caused directly by the negligence of deceased in approaching the railway crossing and in failing to heed the warning of the approaching locomotive. At the second trial before Flaherty, J., defendant's motion for a directed verdict was granted. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Affirmed.

Murphy & Anderson, for appellant.

M. L. Countryman and A. L. Janes, for respondent.

TAYLOR, C.

Arvid A. Holm met almost instant death in a collision with defendant's fast mail train at a railroad crossing in the village of Tintah, and

¹Reported in 166 N. W. 224.

plaintiff as administrator of his estate brought suit for damages. The cause was tried in May, 1916, and resulted in a verdict for plaintiff. Defendant settled a "case" and made a motion for judgment notwithstanding the verdict or for a new trial. The court granted a new trial and in May, 1917, the cause was tried the second time. At this trial, when plaintiff rested, defendant also rested and moved for a directed verdict. The court granted this motion and directed a verdict for defendant on the ground that plaintiff's evidence showed affirmatively that the deceased was chargeable with contributory negligence. Judgment was entered upon this verdict and plaintiff appealed therefrom. settled a "case" embodying the evidence and proceedings at the second trial and caused it to be attached to the judgment roll. In the record he has printed this settled case and also the settled case embodying the evidence and proceedings at the first trial. In his assignments of error plaintiff challenges the order setting aside the first verdict and granting a new trial. Granting a new trial was within the discretion of the trial court. The effect of an order granting a new trial "is to set aside entirely the trial, with all its evidence and proceedings, and the case then stands precisely as if no trial had ever been had." McKenzie v. Banks, 94 Minn. 496, 103 N. W. 497. The present appeal is from the judgment rendered as the result of the second trial; and the propriety of granting the second trial is not before this court for review, and, the first trial having been wiped out, none of the evidence or proceedings at the first trial can be considered upon this appeal.

The only other question is whether the court erred in ruling that the evidence at the second trial showed that the deceased was chargeable with contributory negligence as a matter of law.

The depot at Tintah is on the westerly side of the railway tracks, but Atlantic avenue, the principal business street of the village, is on the opposite or easterly side and extends along the right of way. Fourth street crosses the tracks at right angles and the center line of this street is 258 feet north of the door to the depot. This is the only crossing within the built up portion of the village and passes over five railway tracks. For convenience these tracks were numbered consecutively from 1 to 5 beginning with the track nearest the depot and proceeding easterly. Number 1, the most westerly of these tracks, is the main line, or passenger

track. Defendant's fast mail train for the west passes through the village over this track daily, shortly before one o'clock in the afternoon, at a speed of about 50 miles per hour. It is the duty of the station agent to act as flagman at the crossing whenever this train is to pass.

The deceased was a vigorous, healthy young man in full possession of all his faculties. He was engaged in the livery business in the village and familiar with the situation. Shortly before one o'clock in the afternoon of a bright August day he drove a span of horses attached to an open buggy along Atlantic avenue, turned into Fourth street and proceeded to the crossing of the first or main track. At this crossing he was struck by the fast mail. Until he reached the third track, his view of the main track in the direction from which the train was approaching was entirely obstructed by buildings and by strings of cars upon the other tracks.

Plaintiff presented the testimony of two witnesses who saw the accident. One was the principal of the village school who had gone to the depot to inquire about a trunk. He testified that while talking with the agent the latter remarked that he was expecting the fast mail; that shortly afterward the witness saw the train come in sight and called the attention of the agent to it who thereupon got his flag and walked hurriedly toward the crossing; that the witness accompanied him to the end of the cinder platform when the agent broke into a run for the crossing and the witness turned away from the railroad in a westerly direction toward his hotel; that a few moments later he turned to see if the agent had reached the crossing and saw him in the street waving his flag and at the same time saw the team approaching from the east at a slow trot; that at this time, as near as he could place it, the team was at the fourth track; that the driver was leaning slightly forward and looking downward and did not turn his head and appeared to be paying no attention to his surroundings; that the agent stepped into the middle of the main track excitedly swinging his flag, but the horses continued to trot in the same manner until within 2 or 3 feet of this track before the driver made any move, and that then the agent stepped back out of the way of the train and the driver "held onto his horses all he could, but he was too close to the main track, and the locomotive shot right by, and the horses leaped into the locomotive. I think he wasn't more than two feet from the main track when he tried to hold back his horses."

The other eye witness was a farmer who drove along Atlantic avenue for the purpose of turning into Fourth street and passing over this same crossing. One of his horses was afraid of trains. As he was turning down Fourth street this horse jumped, and on looking he saw the smoke of the train near the depot and also heard the rumble of the train which had apparently frightened his horse. He testified that he then looked toward the crossing and saw Holm with his team, and also saw the agent waving a flag; that the team "wasn't going fast—trotting—a slow trot;" that he saw the agent take some steps forward; that Holm then pulled up his team and it swerved to the right but was struck by the locomotive as it swerved; that he thought that the agent had also been struck until he saw him after the train had passed, and that it all happened so quickly that he was unable to estimate the distance of the team from the track when he first saw it. The team does not appear to have gotten upon the track but to have collided with the corner or side of the locomotive.

A traveler about to cross a railroad track is bound to be alert and vigilant for his own protection, and his failure to use his senses of sight and hearing to discover whether a train is approaching constitutes contributory negligence as a matter of law. 2 Dunnell, Minn. Dig. § 8188, and cases there cited.

It seems plain to us that, if Holm had looked as he approached the crossing, he must have seen the agent with his waving flag in time to have avoided the collision, and that the evidence shows beyond question that he failed to look or to take any precaution for his own safety. It follows that the trial court was correct in ruling that he was chargeable with contributory negligence as a matter of law.

Judgment affirmed.

ABE WARD v. MERCHANTS LIFE AND CASUALTY COMPANY.1

February 1, 1918.

No. 20,711.

Accident insurance — acceptance of delinquent premiums — statutory reinstatement.

1. A policy of accident insurance contained a provision authorized by section 3524, G. S. 1913, to the effect that the acceptance by the insurer of delinquent premiums should reinstate the policy, but only to cover accidental injuries thereafter sustained.

Same — statute valid — case limited.

2. It is held that the provision is valid, and, as to insurance companies operating under the statute, operates as a modification of the rule applied in Mueller v. Grand Grove, U. A. O. D. 69 Minn. 236, and to exclude liability for injuries suffered by the insured when the policy is under suspension by reason of the default.

Action in the municipal court of St. Paul to recover \$50 upon defendant's accident policy. The answer, among other matters, alleged that at the time the injuries were received plaintiff was in default in the payment of the premium upon his policy and that this default continued until October 20, 1916. The case was tried before Finehout, J., who made findings and ordered judgment in favor of plaintiff. From an order denying its motion for amended findings or for a new trial, defendant appealed. Reversed.

P. W. Guilford, for appellant.

William I. Cohen and A. J. Hertz, for respondent.

Brown, C. J.

Action upon an accident insurance policy in which plaintiff had judgment and defendant appealed from an order denying a new trial.

The facts are not in dispute. Defendant is a life and casualty insurance company organized under the laws of the state, and operating un-

¹Reported in 166 N. W. 221.

der the provisions of section 3516, et seq., G. S. 1913. On May 8, 1916, plaintiff applied for and defendant issued to him a policy of accident insurance, thereby obligating itself to indemnify plaintiff for any loss suffered by him in consequence of accidental injury received during the period therein stated. The monthly premiums in consideration of which the policy was issued and continued in force by defendant were payable on the first day of each month, a failure to pay which, unless waived, would result in the forfeiture of all rights under the policy. A premium so fell due on the first of October, 1916, but was not paid until the twentieth of that month. In the meantime, and on the fourteenth, plaintiff received an accidental injury for which he would be entitled to indemnity if the policy was then in force. The payment of the premium after the injury was accepted by defendant, whether with or without notice of the accident to plaintiff, is not important. Plaintiff then presented his claim for indemnity which defendant declined to pay, on the ground that the policy was not in force at the time the injury was received.

It was the contention of plaintiff in the court below, repeated in this court, that the acceptance of the premium on the twentieth, after the injury, was a waiver by defendant of the failure to pay it when due, and an estoppel to interpose a forfeiture in defense to the action. In support of which reliance is had upon the rule laid down in Mueller v. Grand Grove U. A. O. D. 69 Minn. 236, 72 N. W. 48, and other similar cases in this court. The trial court adopted that view of the case and ordered judgment accordingly.

The assignments of error present the single question whether the trial court was in error in the conclusion stated. We answer it in the affirmative.

Prior to the enactment of the statute under which defendant is carrying on its insurance business, above cited, and which as will presently be shown controls the final decision of the case, it had become the settled law of this state, as applied to insurance contracts of this kind, that the payment by the insured of delinquent dues and assessments and the acceptance thereof by the insurer, constitute a waiver of the default and an estoppel to interpose the defense of forfeiture which otherwise would be available as a defense under the terms of the contract. The Mueller case, supra, had consistently been followed and applied in later cases. But

the statute referred to as to corporations acting thereunder authorized the insertion in the policies issued by them of a clause or provision limiting the effect of the acceptance of delinquent dues, which defendant here contends modifies the rule of the Mueller case. The provision so authorized forms a part of the policy in suit, and is as follows:

"If default be made in the payment of the agreed premiums for this policy, the subsequent acceptance of a premium by the company, or by any of its duly authorized agents, shall reinstate the policy, but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance."

The purpose of the legislature in expressly providing for the incorporation of this clause in contracts of insurance of this kind is clear. The language quoted is plain and unambiguous, and will admit of no construction or interpretation other than that contended for by defendant, and as disclosing an intent to change or modify the existing rule on the subject, and to limit and restrict the effect of the acceptance of overdue payments to losses and injuries thereafter suffered by the insured. It clearly excludes liability for previous losses, those suffered during the period of default, by declaring that the acceptance of the payments shall reinstate the policy, but as to the future only. Under the rule of the Mueller case the good standing of the member continued uninterrupted, notwithstanding the default, and recovery could be had on the policy for injuries or death occurring prior to the acceptance of the delinquent payments. Under the terms of this contract the effect of the acceptance of such payments is the creation of a new contract, obligatory upon the insurer for the future only. It was competent for the legislature thus to provide. Plaintiff therefore is not entitled to recover. Gagne v. Massachusetts B. & Ins. Co. (N. H.) 101 Atl. 212.

It is probable that a waiver, such as that applied in the Mueller case, might arise under the terms of this contract, but no facts are here presented to justify that conclusion. No showing is made that defendant ever recognized policies issued by it as continuously in force notwithstanding the default in the payment of premiums when due.

Order reversed.

STATE v. FRED MAMER.1

February 8, 1918.

No. 20,538.

Intoxicating liquor — illegal sale — imprisonment without fine.

Defendant was convicted of selling intoxicating liquor without a license. It is held:

- (1) The evidence sustains the verdict.
- (2) There was no error in an instruction that the jury might consider certain evidence, if true, as an admission of guilt on the part of defendant.
- (3) Defendant cannot complain that the punishment of a fine was not imposed in addition to imprisonment, though the statute provides for both fine and imprisonment.

Defendant was indicted by the grand jury for the crime of selling intoxicating liquor without a license, tried in the district court for Dakota county before Converse, J., and a jury and found guilty as charged in the indictment. From the judgment sentencing him to imprisonment in the county jail for 60 days, defendant appealed. Affirmed.

George H. Gerlich, Jr., for appellant.

Lyndon A. Smith, Attorney General, and James E. Markham, Assistant Attorney General, for respondent.

Bunn, J.

Defendant was convicted of selling intoxicating liquor without a license. The judgment was that he was guilty and be punished by imprisonment in the county jail for 60 days. There was no motion for a new trial. Defendant appeals from the judgment.

Counsel for defendant in arguing for a reversal of the judgment, made these contentions: (1) The verdict is not sustained by the evidence; (2) the court erred in its charge in the respect hereafter mentioned; (3) the sentence was one not authorized by statute.

¹Reported in 166 N. W. 345.

- 1. We have considered the evidence. It was conflicting, but amply sufficient in our judgment to warrant the jury in concluding that defendant sold the liquor as charged in the indictment.
- 2. Shortly after the alleged sale was made defendant was arrested charged with the sale, and also with keeping an unlicensed drinking place. He appeared before a justice of the peace, pleaded guilty to the charge last mentioned, and offered to plead guilty to making the sale which was the basis of the conviction in the present case. The justice refused to accept this plea, on the ground that he had no jurisdiction of the offense. It is claimed that the court erred in receiving the evidence of these proceedings before the justice, and in instructions to the jury in relation thereto. There was clearly no error in admitting the evidence, as it plainly tended to show an admission of guilt by defendant. In its charge the court told the jury that they might consider this evidence, if they believed it to be true, as an admission of guilt. While it might have been better to have omitted particular reference to this evidence, we do not think the instructions complained of amounted to anything more than telling the jury that it might consider this evidence and give it the proper weight. While the instruction is not to be commended. we are unable to say that it was error.
- 3. The sentence was 60 days in the county jail, without any fine. The statute (G. S. 1913, § 3109), provides that the punishment for the offense shall be a fine of not less than \$50 and imprisonment in the county jail for not less than 30 days. Defendant is complaining that he was not fined. Doubtless the trial court would remedy this if it were applied to. We think defendant has no right to complain. If the sentence is void, the result would be the remanding of the case for the imposition of a lawful sentence. State v. Reed, 138 Minn. 465, 163 N. W. 984. We do not understand that defendant wishes this.

Judgment affirmed.

STATE v. C. H. HOLM AND ANOTHER.1

January 25, 1918.

No. 20,771.

Army and navy - circulating seditious pamphlets - violation of statute.

1. Circulating a pamphlet which impugns the motives of the President and Congress in entering into the war, and seeks by unfounded assertions to incite antagonism to the war, the natural tendency of which is to deter enlistments, is a violation of chapter 463 of the Laws of 1917.

Same - no conflict with Espionage law.

2. Chapter 463 of the Laws of 1917, making it a criminal offense to advocate that men should not enlist in the military forces or aid in prosecuting the war does not infringe the constitutional provision conferring upon Congress the power to raise armies, nor the constitutional provision preserving freedom of speech and of the press, and is not abrogated or superseded by the act of Congress of June 15, 1917, known as the Espionage law.

C. H. Holm and Frank Holm were indicted by the grand jury of Ramsey county for the crime of interfering with and discouraging the enlistment of men in the military or naval forces of the United States or of Minnesota. They demurred to the indictment and their demurrer was overruled by Haupt, J., who at their request certified to the supreme court the questions enumerated after the second paragraph of the opinion. Affirmed.

Lyndon A. Smith, Attorney General, Ambrose Tighe, Special Assistant Attorney General, and R. D. O'Brien, County Attorney, for plaintiff.

The pamphlet attacks the constitutionality of the conscription law and declares that the war was entered on through improper motives, without justification and against the popular will, that it is not worthy of popular support and that refusal to register is a patriotic duty. In general the men drafted through the so-called conscription law and those entering the

¹Reported in 166 N. W. 181.

service otherwise are all recognized as having enlisted, as soon as they take the cath required. Sheffield v. Otis, 107 Mass. 282. As used in the conscription law, enlistment means joining the army under any of the methods provided for the purpose, whether through the procedure provided for compulsory draft or by voluntary act. It is not necessary to constitute an offense under the act, even if it applies to voluntary enlistment only, that the pamphlet should in express terms refer to voluntary enlistment as such, or should in express terms advise against it. It is sufficient if its contemplated purpose or reasonable effect is to dissuade men from so joining the army. Masses Pub. Co. v. Patten (C. C. A.) 245 Fed. 102.

The Minnesota act has nothing to do with the raising of armies or with rules and regulations for the government of armies raised or to be raised. It is simply a local police measure, aimed to suppress a species of seditious speech and literature which the legislature has found objectionable. If the legislature has otherwise power to forbid such talk and the circulation of such literature, the fact that it has some possible contributory effect on the Federal function of raising armies, is quite beside the question. The act does not assume to say whether armies shall be raised or how they shall be raised, or what shall be done with them if raised. What it says is that in Minnesota people shall not by word or writing discourage national or state military service. If the act is unconstitutional, it must be on some other ground than that it contravenes anything in article 1 of the Federal Constitution.

Nothing is better settled in American law than that the same act may be an offense against the dignity of several sovereignties and punishable as such by each of them. The same act may be a violation of a state statute and also a violation of a municipal ordinance on the same subject, or the violation of a state statute and also a violation of a Federal statute on the same subject. It is not admitted that the provisions of the Espionage Act are identical with those of chapter 463, Laws 1917, but if they were, the state government's legislation would not be superseded by the act of Congress. Moore v. People, 14 How. 13, 14 L. ed. 306; State v. Oleson, 26 Minn. 507; Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717; U. S. v. Palan (C. C.) 167 Fed. 991; Cross v. North Carolina, 132 U. S. 131, 10 Sup. Ct. 47, 33 L. ed. 287.

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There are two theories about the constitutional guaranties of freedom of speech and liberty of the press. One theory is that they simply forbid laws in the nature of a censorship, which require submission of speech, in advance of utterance, or printed matter, in advence of publication, to some constituted authority for approval, but that the state, while forbidden to require previous approval, is at liberty nonetheless to enact statutes which prescribe a subsequent punishment for speech or publications inimical to the public welfare. Under this theory, a man can say or write what he pleases, but may be punished, if he says or writes something which the legislature has forbidden. The other theory is that the constitutional guaranties permit a man to say or write what he pleases, both without preliminary censorship or license, and also with impunity.

But the overwhelming weight of authority, as well as the express language of the Minnesota constitutional provision, sustains the first view. Const. (Minn.) art. 1, § 3; Rex v. St. Asaph (a) 3 Term Rep. 428; 2 Black, Comm. 1326; State v. Pioneer Press Co. 100 Minn. 173-176.

The second theory is elaborated in 70 Cent. Law Journal, 184-201.

Hermon W. Phillips, for defendants.

The act is repugnant to Const. (U.S.) art. 1, § 8, and Amend. 14, § 1; Const. (Minn.) art. 1, § 3, and art. 4, § 27.

The gist of the offense, whether directed against the nation or state, is the advocating of nonenlistment. Enlistment is, in its inception, a contract, and the act of making this contract of entering the army, is a purely voluntary act on the part of the person entering the service of the government as a soldier. Nonenlistment is not an offense; the failure to advocate enlistment is not an offense and advocating nonenlistment is not an offense.

The national government, having the sole power to raise and support armies, and to make all needful rules in relation thereto, it is beyond the power of the state to add to or take from such provisions as Congress has enacted, indeed it is beyond the power of the state to act in the matter at all whether Congress has acted or not. Houston v. Moore, 5 Wheat. 1, 21, 22, 5 L. ed. 19; Tarble's Case, 13 Wall. 397, 20 L. ed. 597.

The citizen of the United States has a "privilege," the exercise of which this act penalizes, and this privilege is his right to discuss publicly or privately, orally or in writing, the policies of the national government regarding enlistment, or any other plan or system it may be proposed to adopt, or the government should adopt, for the raising of its army or navy. Crandall v. Nevada, 6 Wall. 35, 36, 18 L. ed. 745; Twining v. New Jersey, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. ed. 97; Slaughter House Cases, 16 Wall. 36, 21 L. ed. 395.

The Espionage Act was approved June 15, 1917, 40 St. 231, [See U. S. Comp. St. Temp. Supp. 453], twelve days after the commission of the offense charged by the indictment. Concerning the enlistment problem nothing is of sufficient importance for the national government to concern itself with unless the act shall be done "wilfully" and shall "obstruct," and shall be "to the injury of the service or of the United States," and this only when the government is at war. The Espionage Act supersedes, and nullifies for all purposes, the various enactments of all the states on the same subject matter, even if such enactments could otherwise be of force.

Sole and exclusive power to legislate on the matters now under consideration is vested in Congress. Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. ed. 128; Peirce v. New Hampshire, 5 How. 554, 12 L. ed. 279.

The act is not a police regulation. Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. ed. 780.

TAYLOR, C.

Chapter 463, p. 764, of the laws of the state of Minnesota, approved April 20, 1917, provides: "It shall be unlawful from and after the passage of this act for any person to print, publish or circulate in any manner whatsoever any book, pamphlet or written or printed matter that advocates or attempts to advocate that men should not enlist in the military or naval forces of the United States or the state of Minnesota." Section 1. "It shall be unlawful for any person to teach or advocate by any written or printed matter whatsoever, or by oral speech, that the citizens of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States." Section 3.

The defendants were indicted upon the charge that they had violated this statute by circulating a pamphlet which is set forth in full in the indictment. They demurred to the indictment. The trial court overruled the demurrer, and then, at their request, certified four questions to this court which may be summarized as follows:

- 1. Whether the facts stated in the indictment constitute a public offense?
- 2. Whether the statute conflicts with section 8 of article 1 of the Federal Constitution?
- 3. Whether the statute conflicts with section 1 of the Fourteenth amendment to the Federal Constitution?
- 4. Whether the act of Congress of June 15, 1917, the so-called Espionage Law supersedes, suspends or annuls the state statute?

The pamphlet is, in the main, an attack upon the act of Congress of May 18, 1917, commonly known as the Selective Draft law; but it does not stop with an attack upon that law. It asserts, among other things, that "this war was arbitrarily declared against the will of the people;" that the people are ten to one against it; that "the President and Congress have forced this war upon the United States;" that now "they are attempting by military conscription to force us to fight a war to which we are opposed;" that "the integrity of the country is being menaced;" that "this war was declared to protect the investments;" and that "Wall street is the bonds of the Allies." It then asks: "Why should the entire population be called upon to suffer and die because a few individuals have invested their surplus wealth unwisely? Are you ready to give your life to save their dollars?"

Defendants contend that the term "enlist" as used in the state statute refers only to voluntary enlistments, and that the statute is not violated by an attempt to deter men from complying with the conscription law; while the state contends that the term "enlist" as used in the statute is broad enough to include enlistments under the conscription law as well as voluntary enlistments, and that the statute is violated by an attempt to deter men from complying with the conscription law as well as by an attempt to deter them from enlisting voluntarily. It is not necessary to determine this question in this case for the pamphlet does not confine itself to opposing the means adopted for raising troops, but impugns the motives which induced the President and Congress to enter into the

140 St. 219, c. 80, title I, \$ 3.

war, and attempts by unfounded and unwarranted assertions to incite opposition to the war and to create a feeling that we have been brought into it for mercenary and unworthy purposes. It manifests not merely opposition to conscription, but opposition to the war and to carrying on the war in any manner. Without saying in so many words "that men should not enlist," the whole tenor of the article is calculated to incite opposition to the war and to deter men from enlisting or otherwise aiding in carrying it on. To violate the statute it is not necessary that the pamphlet circulated should directly and expressly urge men to refrain from enlisting, but the statute is violated, if the natural and reasonable effect of the pamphlet circulated is to deter men from doing so. Masses Pub. Co. v. Patten (C. C. A.) 245 Fed. 102; U. S. v. Pierce (D. C.) 245 Fed. 878. We think that such is the effect of the pamphlet in question, and the contention of defendants that, although the pamphlet opposes compliance with the conscription law, it does not oppose voluntary enlistment, and for that reason does not transgress the statute, cannot be sustained.

Defendants also contend in effect that as section 8 of article 1 of the Federal Constitution confers upon Congress the power to declare war and raise armies and to make all laws which shall be necessary and proper for carrying into effect the powers so conferred, it is beyond the power of the state to prohibit its citizens from hindering or interfering with the raising of such armies; that laws to accomplish that purpose can be enacted only by Congress.

These constitutional provisions and the laws of Congress passed pursuant thereto were under consideration in Presser v. Illinois, 116 U. S. 252, 6 Sup. Ct. 580, 29 L. ed. 615, and in Houston v. Moore, 5 Wheat. (18 U. S.) 1, 5 L. ed. 1. In the Presser case it was held that a law of the state of Illinois prohibiting any body of men, other than the militia of the state and the troops of the United States, from drilling or parading with arms without a license from the Governor did not infringe either the Federal Constitution or the Federal laws as it did not interfere with the organization, arming and drilling of the militia as provided by the Federal laws. In the Houston case, a statute of the state of Pennsylvania providing that a member of the militia of that state, who was called into the service of the United States and who refused to obey such call,

should be tried by a state court-martial, and be liable to the penalties prescribed by the act of Congress, was held valid as the delinquent had not actually entered the Federal service and the Federal jurisdiction had not become exclusive. It is clear from these and numerous other Federal decisions that state statutes do not offend against the constitutional provisions cited, unless they trench upon the power of the national government to raise troops, or interfere with or hinder the operation of the Federal laws governing such matters. The statute here in question does neither; it merely prohibits advocating, within this state, that men should not enlist and should not aid in prosecuting the war against the public enemies. In enacting it as a police regulation, the legislature was well within its province.

Neither do we think that the so-called Espionage law of June 15, 1917, passed by Congress, abrogates or supersedes this statute. The citizens of the state are also citizens of the United States and owe a duty both to the state and to the United States. The state is a part of the nation and owes a duty to the nation to support, in full measure, the efforts of the national government to secure the safety and protect the rights of its citizens and to preserve, maintain and enforce the sovereign rights of the nation against the public enemies, and to that end the state may require its citizens to refrain from any act which will interfere with or impede the national government in effectively prosecuting the war against such public enemies. It is the duty of all citizens of the state to aid the state in performing its duties as a part of the nation, and the fact that such citizens are also citizens of the United States and owe a direct duty to the nation does not absolve them from their duty to the state nor preclude the state from enforcing such duty. Halter v. Nebraska, 205 U. S. 34, 27 Sup. Ct. 419, 51 L. ed. 696, 10 Ann. Cas. 525.

True the state cannot make or enforce requirements which are inconsistent with those of the national government, for those of the national government are paramount in case of conflict. But here there is no conflict between the state statute and the Federal law, and both may subsist and be given effect. Presser v. Illinois, 116 U. S. 252, 6 Sup. Ct. 580, 29 L. ed. 615. "Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of

either. The same act may be an offense or transgression of the laws of both." Moore v. Illinois, 14 How. (55 U. S.) 13, 20, 14 L. ed. 306, 309. "Where a person owes a duty to two sovereigns, he is amenable to both for its performance; and either may call him to account." Ex parte Siebold, 100 U. S. 371, 389, 25 L. ed. 717. See also Fox v. Ohio, 5 How. (46 U. S.) 410, 12 L. ed. 213; U. S. v. Marigold, 9 How. (50 U. S.) 560, 13 L. ed. 257; Cross v. North Carolina, 132 U. S. 131, 33 L. ed. 287; In re Green, 134 U. S. 377, 10 Sup. Ct. 586, 33 L. ed. 951; Davis v. Beason, 133 U. S. 333, 10 Sup. Ct. 299, 33 L. ed. 637; Crossley v. California, 168 U. S. 640, 18 Sup. Ct. 242, 42 L. ed. 610; Grafton v. U. S. 206 U. S. 333, 27 Sup. Ct. 749, 51 L. ed. 1084, 11 Ann. Cas. 640; Reid v. Celorado, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. ed. 108; State v. Oleson, 26 Minn. 507, 5 N. W. 959; State v. Lee, 29 Minn. 445, 13 N. W. 913.

The state statute prohibits citizens of the state from discouraging enlistment in either the state or national military forces and from advocating that citizens of the state should not aid in carrying on the war. The act of Congress provides: "Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both." [See U. S. Comp. St. 1917 Supp. § 10212c, p. 453.]

Defendants recognize and call attention to the wide difference between these laws. The one is designed to enforce a duty which the citizen of the state owes to the state; the other to enforce a duty which the citizen of the United States owes to the United States. There are many acts which may violate one but not the other of these laws, and there are also many acts which may violate both, but the state statute is not necessarily invalid for that reason. There is nothing in the statute which is inconsistent with the Federal law, nor which in any manner inter-

feres with, hinders or delays the operation of that law. The state has control of its internal affairs, and in the exercise of its police power may prescribe rules of conduct for its citizens, and may forbid whatever is inimical to the public interests, or contrary to the public policy of the state. 6 R. C. L. p. 191, § 190. That the state is inhibited from exerting its police power to obstruct the operations of the national government, or to regulate matters controlled and regulated by the national government, does not mean that in time of war it may not make the national purposes its own purposes to the extent of exerting its police power to prevent its own citizens from obstructing the accomplishment of such purposes.

Defendants also contend that the statute abridges the freedom of speech and of the press secured to citizens of the United States by the first section of the Fourteenth Amendment to the Federal Constitution. what extent this amendment takes from the states the power to place legislative restrictions upon the freedom of speech and the freedom of the press is still a mooted question; but conceding that it protects this right from abridgment by the states, the freedom secured thereby is not an unlimited license to speak and to publish whatever one may choose. It is settled that the state may prohibit publications or teachings which are injurious to society, or which tend to subvert or imperil the government or to impede or hinder it in the performance of its public and governmental duties without infringing the constitutional provisions which preserve freedom of speech and of the press. These constitutional provisions preserve the right to speak and to publish without previously submitting for official approval the matter to be spoken or published, but do not grant immunity to those who abuse this privilege, nor prevent the state from making it a penal offense to publish or advocate matters or measures inimical to the public welfare. State v. Pioneer Press Co. 100 Minn. 173, 110 N. W. 867, 9 L. R. A. (N. S.) 480, 117 Am. St. 684, 10 Ann. Cas. 351; Patterson v. Colorado, 205 U. S. 454, 27 Sup. Ct. 556, 51 L. ed. 879, 10 Ann. Cas. 689; U. S. v. Pierce (D. C.) 245 Fed. 878; People v Most, 171 N. Y. 423, 64 N. E. 175, 58 L. R. A. 509; Respublica v. Dennie, 4 Yeats (Pa.) 267, 2 Am. Dec. 402; 2 Story, Const. (5th ed.) § 1880.

The United States is at war and we think the legislature did not ex-

ceed its power in making it a criminal offense to advocate that men should not enlist in the military forces or aid in prosecuting the war.

The first question is answered in the affirmative and each of the others in the negative; and the case will be remanded for further proceedings in the trial court.

STATE v. WILLIAM RADKE.

February 8, 1918.

No. 20,539.

Criminal law — illegal sale of liquor — evidence.

1. The evidence sustains the verdict of guilty of unlawful sale of intoxicating liquor.

Same - charge to jury.

2. An instruction that defendant might be convicted on proof of commission of the offense charged at any time within three years was not prejudicial error, the evidence having been devoted wholly to proof of a particular offense on a particular day.

Same - same.

3. An instruction that it made no difference by what name the liquor was called so long as it was intoxicating was clearly proper.

Same — sentence valid when only imprisonment.

4. Where the statute requires both fine and imprisonment, defendant cannot complain of a sentence to imprisonment only.

Defendant was indicted by the grand jury for the crime of selling intoxicating liquor without a license, tried in the district court for Dakota county before Converse, J., and a jury which found him guilty as charged in the indictment. From a judgment sentencing him to imprisonment for 60 days in the county jail, defendant appealed. Affirmed.

George H. Gerlich, Jr., for appellant.

Lyndon A. Smith, Attorney General, and James E. Markham, Assistant Attorney General, for respondent.

¹Reported in 166 N. W. 346.

HALLAM, J.

Defendant was convicted of selling liquor without a license.

- 1. He claims the evidence was not sufficient to sustain a conviction. We think it was. Liquor in considerable quantity was found on his premises. Two witnesses swore to the commission of the particular offense charged. They were not men of high character but the truth of their testimony was for the jury to détermine. They were corroborated by some undisputed facts. The verdict should not be disturbed on this ground.
- 2. The court charged the jury in substance that they might find the defendant guilty if he sold liquor to the parties named on March 30, 1917, the date charged in the indictment, "or at any other time within three years last past." The charge was too broad as to time, since defendant had been a duly licensed saloonkeeper within three years. The error could not in this case mislead the jury or prejudice the defendant. The evidence was all confined to a sale on March 30, 1917, a time when it was unlawful to sell, and the jury must have understood they must convict or acquit on this testimony.
- 3. The court charged the jury that it made no difference what the liquor sold was called, "whether it is called beer, malt, notox * * * the only question is, was it intoxicating liquor?" This was proper. Defendant claims that this instruction permitted a conviction for selling a malt drink that was not intoxicating. Clearly it did not.
- 4. The court sentenced the defendant to 60 days in the county jail. He complains of this because the statute requires punishment by both fine and imprisonment. G. S. 1913, § 3109. Defendant cannot escape the sentence imposed because of this piece of good fortune. He may apply to the court to correct the sentence. Should he do that, he will doubtless receive the sentence that the statute requires. There is no other remedy for such omissions. State v. Reed, 138 Minn. 465, 163 N. W. 984; State v. Mamer, supra, p. 265, 165 N. W. 345.

Judgment affirmed.

MARTHA PLACHETKO v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.1

February 8, 1918.

No. 20,554.

Master and servant — failure to warn servant of danger — evidence not conflicting.

In this action for wrongful death, alleged to have been caused by defendant's negligent failure to give the customary warnings before moving cars in a repair yard, it is held:

- (1) The evidence affirmatively shows that the customary warning was given deceased by calling out in his presence that the cars between which he was caught were about to be moved.
- (2) The testimony fails to show that defendant omitted to ring the bell on the locomotive at the time the cars were moved. The positive direct testimony of witnesses to the fact that the bell was ringing was not overcome, nor made a question for the jury by the equivocal impeachment of one or two witnesses, nor by the testimony of others who were absorbed in their work, and who could only testify that they were not conscious of its ringing and could not say whether it did or not.

Action in the district court for Ramsey county by the administratrix of the estate of Joseph Plachetko, deceased, to recover \$25,000 for the death of her intestate while in defendant's employ. The answer alleged that plaintiff's intestate was negligent, that the physical conditions surrounding the work were patent and that he assumed the risk. The case was tried before Michael, J., who granted defendant's motion for a directed verdict. From an order denying her motion for a new trial, plaintiff appealed. Affirmed.

Hall & Tautges, for appellant.

Barrows & Stewart, for respondent.

HOLT, J.

The appeal is from the order denying a new trial, there having been a verdict directed in favor of defendant.

1Reported in 166 N. W. 338.

The main question is whether there was any evidence to go to the jury of the negligence alleged as the cause of the death of plaintiff's intestate. Plachetko, plaintiff's intestate, was one of about 80 men working for defendant in the repair of cars at its repair yard in St. Paul. This yard consisted of three parallel tracks, holding about 40 cars each when spaced a distance of 5 to 6 feet apart. The track nearest the river was known as number 1, the next number 2, and the next number 3. The distance between numbers 1 and 2 was about 18 feet, and between 2 and 3 about 14 feet. This yard was protected from outside interference by a danger signal and a derail device on the lead track. When the men had repaired a desired number of cars a locomotive and train crew were sent into the yard to pull them out, and to set in and space others needing repair. It was the aim to have this moving done during the noon hour when the repairers were at lunch, but at times this work could not be finished within the half hour or hour allotted for lunch. March 4, 1916, while the repairers were eating their lunch in a shanty located about the middle of this yard, the train crew came in with a locomotive and pulled the repaired cars on track 3, and were finishing placing cars needing repairs back onto that track, when the men returned from lunch. Then the locomotive backed out onto the lead and came in on track 2. The foreman for the repair crew and one or two assistants meanwhile were passing up and down both sides of the 12 or 14 cars to be moved on track 2, and calling out the customary warning to the men that track 2 was to be pulled. The testimony leaves no doubt that this warning was given within 3 or 4 feet of Plachetko, who had set down his tool box beside a car just set in on track 3 and was standing near by. He had evidently selected that car as the one upon which to work. The men usually worked in pairs. Plachetko's partner on coming back from lunch had stepped into a box car on track 1 to show the man working thereon how to proceed. When the warning had been called out, and one of the train crew had passed to the further end of the cars to be pulled for the purpose of seeing that the couplers were in proper shape, the signal was given for the locomotive to come ahead, the locomotive having in the meantime approached within 6 or 8 feet of the first car. The signal was obeyed. Just about this time Plachetko attempted to pass to the other side of track 2 by going between the third and fourth car from the locomotive, and was caught between the bumpers, receiving such severe injuries that he died within a short time.

The negligence alleged was the moving of the locomotive and cars without giving notice and warning thereof by sounding whistles or ringing the bell, or both, contrary to the general custom and rules. The evidence discloses that the usual practice was to give two warnings, one by calling out before the locomotive was started against the cars. The other was to ring the locomotive bell as soon as it began to move. As to the former it affirmatively appears that it was given so that the deceased unquestionably heard and understood that the cars on track 2 were about to be pulled. He had worked in this yard for a considerable time and well knew the practice. So that no negligence can possibly be predicated upon a failure to give the customary oral warning.

The only other negligence attempted to be established was failure to ring the bell. A rule, as well as a custom, required the bell on the locomotive to be ringing when cars were being moved in this yard. Three witnesses testified positively that it was ringing. It was an automatic bell. No witness attempted to state as a fact, that it did not. The conclusion of one that it did not ring was properly stricken, because it clearly appeared that all he meant to convey was that he did not notice whether it did or not. He was inside a box car chiseling a hole in its floor, and of course occupied with his work and had no occasion to listen for danger signals. That was also the effect of the testimony of all the other witnesses of whom inquiry was made on that subject. Not one of them was listening to hear the bell ring, or was concerned about the matter. As said in Cotton v. Willmar & Sioux Falls Ry. Co. 99 Minn. 366, 109 N. W. 835, 8 L.R.A. (N.S.) 643, 116 Am. St. 422, 9 Ann. Cas. 935: "The testimony of a witness that he did not hear a bell rung is thus of itself, as against direct and positive testimony of another that the bell did ring, no evidence that it did not ring, but, taken in connection with evidence showing that the witness could and probably would have heard it, had it been rung, and that he was listening to hear it ring, is evidence that it did not ring." Under this rule, carefully stated in the opinion and fortified by authority, we agree with the learned trial court that there is not sufficient probative force in this so-called negative testimony, even if coupled with a presumption that the deceased in the exercise of due care would not have attempted to go between the cars had he heard it ringing, to permit a jury to say that it did not ring when there is such positive and direct evidence that the automatic bell was started and was ringing as soon as and while the locomotive was moving on track 2. To hold otherwise would be to let mere conjecture (for that is all that can be got out of the witnesses who testify to not knowing whether or not the bell did ring) overcome positive evidence which is neither inherently improbable nor discredited by the established facts.

The impeachment of the witness Lee, who testified that he heard it ring, is of so doubtful a character as not to be of any weight. It is so easy to misunderstand one another in these interviews between one who has witnessed an accident and the attorney or claim agent of an interested party. This also applies to the impeachment of certain other witnesses. What little weight might attach thereto should not be permitted to do away with a fact established by direct positive evidence of unimpeached witnesses.

There is nothing in the point that there was a failure of the men to observe the custom of warning each other of danger and because of such failure Plachetko was injured, for there was no evidence that any one saw him start to go between the cars, or knew that he intended to cross until too late to prevent the accident.

One of the assistant foremen, who called out the warning to the men, incidentally testified to the fact that he passed over between cars further away from the locomotive just about the time Plachetko was caught. After a long cross-examination in which the witness stated that he did not hear the bell; that he was then giving that matter no attention; that he knew what he was doing when he ran across the track, he was asked the further question: "Well, if you took the risk of going in between there within 9 car lengths of the engine, don't you think you were pretty sure that you had not heard the bell, or you never would have gone through there?" The objection that the question was argumentative and the matter gone over was sustained. We think both grounds of the objection proper.

We discover no reversible ruling, nor any evidence which might charge defendant with negligence causing the distressing death of plaintiff's intestate.

Order affirmed.

OLAF ERICKSON v. M. F. REINE.1

February 8, 1918.

No. 20.637.

Principal and agent — negligence of agent in payment of mortgage — evidence.

1. Evidence examined and held sufficient to sustain the verdict of a jury to the effect that the defendant, in transacting business for plaintiff as his agent, was negligent in remitting funds in his hands for the payment and discharge of a real estate mortgage, to a party other than the owner of the mortgage.

Same -- charge to jury.

2. Instructions of the trial court considered and found to contain no reversible error.

Action in the district court for Stearns county to recover \$1,138.03. The facts are stated in the opinion. The case was tried before Nye, J., and a jury which returned a verdict for \$1,084.30. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

- J. D. Sullivan and Frank Tolman, for appellant.
- R. B. Brower, for respondent.

Quinn, J.

Action to recover damages which plaintiff claims to have sustained through the negligence of the defendant, as his agent, in making a farm loan and applying the proceeds thereof in payment and discharge of a former mortgage upon the same property. The plaintiff recovered a verdict. From an order denying his motion for judgment notwithstanding the verdict and, in case that be denied, for a new trial, defendant appealed.

The plaintiff alleges, in effect, that on May 10, 1901, Theodore Blomberg was the owner of the farm of 120 acres described in the complaint,

1Reported in 166 N. W. 333.

and on that day executed his note for \$800, payable to one F. N. Vaughan on May 10, 1911, with interest, and at the same time executed to Vaughan a mortgage upon said farm securing its payment, which mortgage was duly recorded in the office of the register of deeds of Stearns county where the real estate was situate. Thereafter the time of payment of said note and mortgage was duly extended to May 10, 1912. On October 20, 1911, the plaintiff, through mesne conveyances, became the owner in fee of said farm, subject to the Vaughan mortgage.

Plaintiff further alleges that, during the month of May, 1912, and for a number of years prior thereto, the defendant M. F. Reine was engaged in the handling of farm lands, the making of farm loans, and that he held himself out to the public as one qualified and capable of transacting all kinds of real estate loans and transfers. That in April, 1912, as the maturity of the Vaughan mortgage debt approached, the plaintiff applied to the defendant for a loan of \$800 upon the farm mentioned, with which to take up the Vaughan mortgage thereon; that the defendant agreed and undertook to procure a loan and handle the matter for plaintiff; that pursuant to such arrangement defendant called for plaintiff's abstract of title to such land, and on May 6, 1912, prepared a note and mortgage covering said land and running to one Ole Ille, with whom defendant had arranged for the loan of \$800, payable in 3 years from date, which plaintiff and his wife duly executed. This mortgage was recorded in the office of the register of deeds of Stearns county on May 8, 1912.

Vaughan lived in the state of Illinois. At the time of the extension of the payment of the mortgage, the then owner of the premises gave Vaughan a note for \$48 to cover the interest for the ensuing year. This note was payable at the office of the American Mortgage & Investment Company, of St. Paul, where the interest coupons of the Vaughan mortgage had been paid for a number of years. After recording the mortgage which plaintiff had signed, the defendant sent the note thereby secured to Mr. Ille, who lived in the southern part of this state, and requested him to send him a draft therefor payable to the order of the American Mortgage & Investment Company, which request was complied with. Plaintiff had given defendant a check for \$60 with which to pay the \$48. On June 11, 1912, defendant sent the \$800 draft, to-

gether with his personal check for \$52.55 to the American Mortgage & Investment Company for the purpose of paying the Vaughan mortgage and interest, and at the same time requested the investment company to return to him the mortgage note and a satisfaction of the same.

Defendant gave the matter no further attention until about the middle of July, when it was found that the investment company had cashed the draft and check and that a receiver had taken charge of its affairs, and the money was lost to the plaintiff. Thereafter Vaughan fore-closed his mortgage and the land was sold at sheriff's sale on May 2, 1914, at \$1,082.33. The plaintiff was compelled to redeem the same from such sale in order to save his land. He then brought this action to recover damages from the defendant, upon the ground of the negligent manner in which he had transacted the business so entrusted to him.

In his answer the defendant alleges: First, that the plaintiff directed the remittance of the money to the American Mortgage & Investment Company; and, second, that he was not negligent. The trial court fully and fairly submitted the issues so raised to the jury. A verdict was returned in favor of the plaintiff for the sum of \$1,084.30, being the amount of money sent by defendant to the investment company, with interest.

Where one party undertakes to transact business for another, he becomes the agent of the one for whom he acts, and as such is bound to exercise ordinary or reasonable care in the transaction of such business so entrusted to him. While not an insurer he is bound to exercise that degree of care and skill usually exercised by persons of ordinary prudence and skill engaged in the same or like business.

1 Dunnell, Minn. Dig. § 197; Lake City Flouring Mill Co. v. Mc-Vean, 32 Minn. 301, 20 N. W. 233; Hardwick v. Ickler, 71 Minn. 25, 73 N. W. 519; Eisenberg v. Matthews, 84 Minn. 76, 86 N. W. 870; Veltum v. Koehler, 85 Minn. 125, 88 N. W. 432.

We have carefully examined the evidence and considered the instructions of the trial court, and are satisfied that the verdict is amply sustained by the evidence and that there was no prejudicial error in the instructions.

Affirmed.

RAYMOND A. KELLY v. HERBERT B. McKEOWN.1

February 8, 1918.

No. 20,657.

What errors reviewable on appeal from order denying new trial.

1. Upon appeal from an order denying a new trial, a party cannot take advantage of any errors occurring on the trial and not excepted to, unless he specifies them in his notice of motion.

Refusal to give instructions to jury.

2. Requests to instruct the jury, made by plaintiff, considered and held to have been properly refused, under the issues and proof in the case.

Contributory negligence question for jury.

3. Evidence considered and held to have justified the trial court in submitting the question of decedent's contributory negligence to the jury, and the evidence sustains the verdict.

Action in the district court for Hennepin county by the administrator of the estate of Maurice Kelly, deceased, to recover damages for his death. The answer alleged that deceased, without warning and contrary to the rules of the road and ordinances of St. Paul and laws of Minnesota, carelessly and negligently turned sharply to the left and immediately in the pathway of defendant's automobile, and by reason thereof his death was due to his own carelessness; that he was a bright active boy and knew the rules of the road and was familiar with the operation of automobiles at the place where the collision occurred. The case was tried before Molyneaux, J., and a jury which returned a verdict in favor of defendant. From an order denying his motion for a new trial, plaintiff appealed. Affirmed.

John F. Kelly, for appellant.

Trafford N. Jayne, for respondent.

¹Reported in 166 N. W. 329.

QUINN, J.

This is an action to recover damages, for the exclusive benefit of the next of kin, for the death of Maurice Kelly, a boy between 10 and 11 years of age, alleged to have been caused by the wrongful act of defendant. In the court below there was a verdict for the defendant. From an order denying his motion for a new trial plaintiff appealed.

The motion for a new trial was based upon the minutes of the court and the assignments of error contained in the notice of motion. A case was thereafter made and settled. The plaintiff took no exception to any ruling of the court at the trial, except its refusal to instruct the jury as plaintiff requested, nor did he specify or point out any particular alleged error in his assignments as required by G. S. 1913, § 7830. Under this statute it has been held by this court in numerous decisions that, on a motion for a new trial, a party cannot take advantage of any errors occurring on the trial and not excepted to, unless he specifies them in his notice of motion. Cappis v. Wiedemann, 86 Minn. 156, 90 N. W. 368; Olson v. Berg, 87 Minn. 277, 91 N. W. 1103; Parker v. Pine Tree Lumber Co. 89 Minn. 500, 95 N. W. 323; Conan v. City of Ely, 91 Minn. 127, 97 N. W. 737.

The assignments of error in the notice of motion which appears in the printed record are as follows:

"First. The court did not submit to the jury the issues raised by the pleadings nor instruct the jury as to the law concerning said issues, hence there was no trial of said issues.

"Second. For errors of law occurring at the trial of said cause: (1) In the court's instructions to the jury; (2) in not submitting to the jury the issues raised by the pleading; (3) in instructing the jury concerning contributory negligence; (4) in not stating all the law regulating the speed of automobiles and explaining the same; (5) in refusing to instruct the jury as plaintiff requested.

"Third. The verdict is not justified by the evidence.

"Fourth. The verdict is contrary to law.

"Fifth. Accident or surprise which could not have been prevented by ordinary prudence.

"Sixth. Irregularity and abuse of discretion depriving plaintiff of fair trial."

The only assignments of error which we are permitted to consider are, the refusal of the court to give the plaintiff's requested instructions, and whether the verdict is justified by the evidence.

It appears that University avenue extends from Minneapolis in a southeasterly direction toward St. Paul, and that Eustis street extends due north and south across University avenue. The deceased was riding a bicycle and stopped about 70 feet west of the southwest corner of the intersection of University avenue and Eustis street at the curb near an iron electric post to adjust his bicycle. At this time defendant was coming from the direction of Minneapolis in an automobile, driving between the street car track and the south curb on University avenue, at a speed of from 20 to 25 miles an hour. As he approached Eustis street his left wheel was at or near the south car track when decedent mounted his wheel near the south curb where he had been adjusting it, and started southeast toward Eustis street; then he turned to the left to cross over the avenue and came in contact with the defendant's automobile. He was thrown to the pavement, his skull fractured and his death resulted immediately.

The witness Tsiolis, called by the plaintiff, testified in substance that he was less than a block away and saw the accident; that the defendant was coming down the avenue at about 25 miles an hour; that his left wheel was at or near the south car track; that when he first saw the boy he was about 15 feet ahead of the automobile between it and the south curb; that the boy turned to the left, and as soon as he made the turn he was struck by the automobile.

The witness Sawyer, called by plaintiff, testified that he saw the accident; that he first noticed the defendant coming along toward Eustis street at a speed of about 25 miles an hour; that the boy was on his bicycle "making a turn toward the corner gradually, then he seemed to turn awful quick, not a sharp turn, but a gradual turn toward the left;" that he was working his bicycle to go across to this side and McKeown was coming down behind him; that when the boy was making the turn to the left McKeown's automobile was also turning to the left toward the street car tracks trying to avoid the boy.

Other witnesses gave testimony along this same line as to how the

accident occurred. The testimony made a clear case for the jury as to contributory negligence on the part of deceased.

The trial court submitted to the jury the question of negligence on the part of the defendant and contributory negligence on the part of the deceased. The jury returned a verdict in favor of the defendant.

We have considered with care all of the testimony as it appears from the original settled case, and are satisfied that the question of contributory negligence was properly submitted to the jury and that the evidence justifies the verdict. There was no testimony of wanton or wilful negligence on the part of the defendant. Plaintiff submitted seven requests to instruct, and each has been carefully considered, with the result that we find no error in the court's refusal to charge the jury as requested.

Affirmed.

FRANK WILLETT v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY AND ANOTHER.1

February 8, 1918.

No. 20,660.

Evidence of wilful negligence.

Evidence examined and held insufficient to show wilful negligence.

Action in the district court for Ramsey county by a minor, to recover \$25,000 for injuries received while crossing defendant's bridge. The answer alleged the negligence of the minor. The case was tried before Michael, J., who denied defendant's motions for a directed verdict, and a jury which returned a verdict for \$10,000. From an order denying their motion for judgment notwithstanding the verdict or for a new trial, defendants appealed. Reversed.

F. W. Root and Nelson J. Wilcox, for appellants.

Barton & Kay, for respondent.

¹Reported in 166 N. W. 342.

Bunn, J.

This case is before the court on the appeal of defendants from an order denying their motion in the alternative for judgment notwithstanding the verdict for plaintiff, or for a new trial.

Plaintiff, a young man 18 years of age, had attended a dance at La Crescent, Minnesota, on the evening of September 22, 1916. At about four o'clock in the morning of the twenty-third, while he was on his way to his home in North La Crosse, by the way of defendant railway company's bridges between River Junction on the Minnesota side of the Mississippi and North La Crosse on the Wisconsin side, he was struck by an engine coming from the west, hauling a freight train of some 13 cars.

There are four bridges between River Junction, or bridge switch on the Minnesota side of the river, and North La Crosse; they are from west to east as follows: A bridge over the west channel of the Mississippi, one over the east channel, one over French Slough, and one over the Black River. Defendant operates but a single track across these bridges. The bridges and trestles between them are not wide enough to accommodate a train and foot passengers at the same time. Warnings were posted conspicuously on the right of way. Over 50 trains a day crossed the bridges on this track. It is entirely clear that plaintiff's attempt to reach his home by the route he took was an extremely hazardous one. It is rightly conceded that he was a trespasser. But of course notwithstanding his negligence, and in spite of his being a trespasser, he may still have just ground for complaint, if the engineer failed to use due care to avoid running him down, after seeing him on the track ahead.

Plaintiff's right to recover was made by the trial court to depend entirely on whether the engineer, codefendant in this case, was guilty of so-called "wilful" negligence, and it is admitted that the verdict can be sustained on no theory other than that the evidence justified a finding that the engineer, after seeing plaintiff on the track ahead in a position of peril, failed to use ordinary care to avoid striking him. Defendants claim that there was no evidence which warranted the submission of this issue to the jury, or at least that the verdict is so against the weight of the evidence that it was error to refuse a new trial.

The vital points in the inquiry to ascertain if there was evidence of wilful negligence are as to the distance of plaintiff from the engine at the time the engineer first saw him, and as to what the engineer did to avoid the accident. The witnesses, whose testimony bear upon these points, are plaintiff, the engineer, the fireman and the head brake-Plaintiff testified that he was about the center of the bridge across French Slough when he heard an engine whistle behind him; that he looked back and saw the headlight of the engine just coming into view around a curve; that he waved his hat; that there was then a short blast of the engine whistle; that he then ran in an effort to escape; he was struck at the east end of the bridge; he testified that the headlight threw its rays on the track ahead so that he could see clearly a great distance to the east. French Slough bridge was 860 feet in length; the track runs straight to the west for some 300 feet beyond the bridge. If plaintiff's testimony is true and accurate, it is fairly clear that the engineer could have seen him on the track when the engine was some 730 feet away, had he been giving his undivided attention to looking at the track ahead.

The engineer testified that he first saw plaintiff when the engine was about in the middle of the bridge and plaintiff was 5 or 6 car lengths ahead, that he immediately blew the whistle and applied the brakes. His estimate of the distance within which his train could be stopped was about 8 car lengths or 320 feet. It did not in fact stop until the engine was some two car lengths beyond the place where plaintiff was struck, the east end of the bridge. In a statement given plaintiff's attorneys before the trial, the engineer said that he saw plaintiff running on the bridge when his engine was just about to the Minnesota side of the bridge. The witness explained this statement by saying that he meant the west end of the truss part of the bridge; the truss or superstructure was in the middle of the bridge, and was 160 feet long. The witness testified that, about as the engine rounded the curve and came onto the straight track, he shut off the steam and blew the whistle for the draw in Black river bridge, that the speed of the engine was from 25 to 30 miles an hour before the steam was shut off, and slightly diminished after. He was pressed as to whether he was looking ahead after coming onto the straight track, but was unable to remember. there being various things that demanded his attention on the engine.

The fireman heard the short blasts of the whistle and the air applied, but was not in a position to see ahead.

The head brakeman testified that he heard the air applied for the emergency brakes, and the short blasts of the whistle, looked ahead and saw plaintiff 10 or 15 feet in front of the engine. In a statement given by this witness before the trial to a representative of the attorneys for plaintiff, he said: "When we came around the curve we saw the man on the track; we thought he would step off on the side of the bridge, and when the engineer saw that he was not, he whistled a lot of times and set the air, and was going about 35 miles an hour and was unable to stop in time."

Plaintiff claims that the evidence we have summarized not only made the case for the jury, but justified the conclusion of that body that the engineer saw plaintiff in ample time to have avoided striking him, if he had used ordinary care in promptly applying the brakes. It is frankly conceded that plaintiff was obliged to show that the engineer actually saw plaintiff, and failed to use due care to avoid injuring him.

A majority of the court is of the opinion that the evidence does not show that the engineer did not do all he could to avoid the accident after seeing plaintiff in a position of peril. The train was running at high speed; it was in the night time, and a headlight, however good, is not daylight; there was no reason to anticipate obstructions on the bridges or trestles, and no particular reason why the engineer should have been watching the track ahead. There is no evidence but his own that he was. The distance between the engine and plaintiff grew shorter very fast, and the evidence of estimates of what this distance was at any particular point is most unsatisfactory. The unexpected appearance of an object on the track ahead required reasonable care of the engineer, but no more; the circumstances must be considered, and the failure to apply brakes instantaneously would not show negligence. Plaintiff's case is utterly devoid of real merit, and it is only the so-called "wilful or wanton" negligence doctrine that gives him a standing in court in spite of his gross negligence and trespassing. It is manifest from the nature of the case that it cannot be improved on another trial. All those who saw the accident have testified fully. According to the views of a majority of the court, it is a case for final judgment, rather than a new trial.

Order reversed and judgment for defendant ordered.

W. V. SMALL'v. MARY B. ANDERSON.1

February 8, 1918.

No. 20.661.

Homestead — exchange of property to defraud creditors — findings sustained.

1. A judgment debtor transferred to his wife all his unexempt property, in consideration of a transfer by the wife to him of certain real property which the debtor thereafter claimed as his homestead, and as such exempt from sale on execution; his claim was that the transaction was had for the sole purpose of acquiring a homestead, but the evidence tended to show that the parties then occupied the particular property as a family home, though the title was of record in the wife's name. It is held, that the findings of the trial court to the effect that the transaction was entered into by the parties for the purpose of defrauding the creditors of the husband are sustained by the evidence.

Same — case limitéd.

2. The rule stated and applied in Jacoby v. Parkland Distilling Co. 41 Minn. 227, should not be extended to a case where the debtor has existing homestead rights in property standing of record in the wife's name.

Receiver in supplementary proceedings not entitled to attorney's fee.

8. A receiver appointed in proceedings supplementary to execution, solely in the interests of a particular creditor, is not entitled to attorney's fees for the prosecution of an action to set aside an alleged fraudulent conveyance of property, where the creditor could have maintained the same action in his own name without resorting to the receivership proceedings.

¹Reported in 166 N. W. 340.

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Action in the district court for Crow Wing county to set aside certain transfers of real and personal property made by N. C. Anderson and subject them to the lien of a judgment, on the ground that the transfers were made with intent to delay and defraud his creditors. The facts are stated in the opinion. The case was tried before Stanton, J., who made findings and ordered judgment in favor of plaintiff together with \$85 attorney's fees. From the judgment entered pursuant to the order for judgment, defendant appealed. Modified and affirmed.

Murphy & Cook, for appellant.

Alderman & Clark and Charles C. Teare, for respondent.

Brown, C. J.

One Marion Cunningham brought suit in the district court of Crow Wing county against N. C. Anderson, and therein on November 18, 1916, recovered a verdict against Anderson for the sum of \$800. Judgment was duly rendered upon the verdict on December 28, 1916, and execution thereon was returned unsatisfied. It appears that at the time the verdict was so rendered Anderson was the owner of certain real and personal property, particularly described in the complaint, the value of which in the aggregate exceeded the amount of the verdict and judgment. The property was all unexempt and subject to levy and sale on execution. Soon after the date of the verdict and before the entry of the judgment, namely, on November 24, 1916, Anderson conveyed and transferred all such property to the defendant in this action, who is and was at the time his wife; such conveyance and transfer having been made through a third person acting as intermediary at the request of Anderson. In consideration of such transfer Mrs. Anderson conveyed to Anderson a tract of land then of record in her name and upon which the parties then resided as the family home, and which Anderson thereafter claimed as his homestead, and as exempt from execution sale for his debts.

These facts were developed in proceedings supplementary to execution, as the result of which plaintiff was appointed receiver of Anderson's property and effects, with authority to pursue the property so transferred to defendant, to the end that it might be made available for the payment of the judgment. This action followed.

The complaint set out the facts stated, and in addition thereto alleged that the transfer of the property was made for the purpose of hindering, delaying and defrauding the creditors of Anderson, particularly Cunningham. Defendant by her answer admitted substantially the facts so pleaded, but in defense and justification of the exchange of properties alleged that the purpose of the parties was to secure a family homestead in the name of Anderson, and for no other purpose. The allegations of fraud are denied.

The trial court found that the purpose of the transfer of the property by Anderson was to hinder and defraud his creditors, and to prevent Cunningham from enforcing his judgment against the same; that both Anderson and his wife participated in the fraud. As conclusions of law the transfer was ordered canceled and held for naught, that the Cunningham judgment be declared a lien thereon, and that plaintiff have judgment accordingly, with \$85 attorney's fees and the costs of the action.

1. Except as to the findings of the court to the effect that the transfer and exchange of properties as stated in the foregoing outline of the case was made for the purpose of hindering, delaying and defrauding creditors, the facts are not in dispute. It is the contention of defendant that Anderson had the legal right to acquire a homestead by purchasing and paying therefor with his nonexempt property, in the manner here disclosed, and that his creditors are in no position to complain. She relies in support thereof upon the rule stated and applied in Jacoby v. Parkland Distilling Co. 41 Minn. 227, 43 N. W. 52. The contention is not sustained. The facts as found by the trial court do not bring the case within the rule there laid down. The court made no finding to the effect that the exchange of properties was with a view on the part of Anderson of acquiring a homestead for himself and family. The findings are silent upon that feature of the case and there was no motion or other request for specific findings thereon. While there is evidence in the record tending to show that the purpose of Anderson in effecting the exchange of properties was the acquisition of homestead rights in that received from his wife, which, if it stood alone, might be held to conclusively establish the fact contended for and the case disposed of from that viewpoint, yet it is not the only evidence upon the subject. Other evidence tends to show that at the time of the trans action Anderson had full and complete homestead rights in the particular property so received from his wife. If the trial court had been requested for specific findings upon this feature of the case, it could well have found the existence of full homestead rights in that property, though the title thereof was of record in his wife's name. G. S. 1913. § 6960. The rule of the Jacoby case should not be extended to a case of that kind, and since the evidence is not conclusive in favor of defendant's contention the case must be disposed of upon the theory of the findings, and that the sole purpose of the transaction was to defraud the creditors of Anderson.

The complaint demanded and the court allowed to plaintiff an attorney's fee of \$85, in addition to the costs and disbursements of the action. Defendant contends that the allowance was without authority and should be eliminated and defendant relieved therefrom. We sustain this contention. In receivership proceedings, prosecuted in behalf of all creditors of an insolvent concern, attorney's fees are usually allowed to the receiver as an item of expense incident to the proceeding. But neither the statute nor rule of the court authorizing such an allowance can have application to a receiver appointed in proceedings supplementary to execution, where the proceeding is had and the receiver appointed in the interests of a particular creditor. In such case the receiver represents the creditor and the reason for the allowance of attorney's fees in the instance stated does not apply. Cunningham, the judgment creditor, could have maintained this action in his own name and a receiver was wholly unnecessary. Jackson v. Holbrook, 36 Minn. 494, 32 N. W. 852, 1 Am. St. 683; Brasie v. Minneapolis Brewing Co. 87 Minn. 456, 92 N. W. 340, 67 L.R.A. 865, 94 Am. St. 709. Had he brought the action in his own name the costs and disbursements would have been limited to those of ordinary civil actions, and no attorney's fees could have been included therein. The creditor in such case can impose no greater burden upon the defendant by unnecessarily causing the appointment of a receiver.

The judgment will be modified by striking therefrom the allowance of attorney's fees, and as so modified affirmed.

S. S. MATSON v. E. J. BAUMAN.¹

February 8, 1918.

No. 20.676.

Corporation — sale of stock — breach of agreement to repurchase — action for price.

1. Defendant sold and delivered to plaintiff five shares of the capital stock of a certain corporation, and as a part of the transaction agreed to repurchase or take the same back at a stipulated amount on a date specified, if plaintiff then wished to sell the same. It is held, following Lyons v. Snider, 136 Minn. 252, that a breach of the agreement by defendant vested in plaintiff the right of action for the amount stipulated to be paid on the return of the stock.

Same — statute of frauds — Iowa law controlling.

2. The contract was entered into in the state of Iowa, where the parties resided, and with reference to the laws thereof, and its validity as to the statute of frauds is controlled by the laws of that state.

Same — tender and demand seasonable.

3. A tender of the stock and demand that defendant perform his contract to repurchase the same was seasonably made; time was not of the essence of the contract and it was not necessary that the demand for performance be made on the precise date named in the contract.

Same — evidence of agency not sustained.

4. The contract was the personal obligation of defendant, and the claim that the stock was sold by him as the agent of the corporation is not sustained.

Action in the district court for Ramsey county to recover \$500 upon the contract set out in the opinion. The answer alleged that long prior to this action defendant revoked any offer he may have made to plaintiff for the purchase of the stock. The case was tried before Olin B. Lewis, J., who at the close of the testimony denied defendant's motion for a directed verdict, made findings and ordered judgment in favor

¹Reported in 166 N. W. 343.

of plaintiff. From an order denying his motion for amended conclusions of law or for a new trial, defendant appealed. Affirmed.

Harold Harris, for appellant.

S. P. Crosby, for respondent.

Brown, C. J.

The facts in this case as disclosed by the record are substantially as follows: Plaintiff and defendant at the time of the transaction here involved resided at Goodell in the state of Iowa, and had known each other for many years. The Washington Brick, Lime & Sewer Pipe Company is a corporation engaged in the business indicated by its name in the state of Washington. The trial court found that on December 6, 1909, defendant "had for sale and did sell to plaintiff five shares of the common stock" of that corporation at the price of \$100 per share. When the stock was first offered to him plaintiff apparently had some doubts as to the value thereof and of the propriety of such an investment, and so indicated to defendant. Whereupon and as a part of the transaction and to induce and bring about a sale defendant entered into an agreement by which he promised to repurchase the stock from plaintiff on July 1, 1915, if plaintiff then wished to dispose of it. The agreement was in writing and in the following language:

"Goodell, Iowa, December 6th, 1909.

"I, E. J. Bauman, hereby agree to pay S. S. Matson \$500 for five shares of \$100 each, of the common stock of the Washington Brick, Lime & Sewer Pipe Company of Spokane, Washington, on July 1, 1915, providing the said S. S. Matson wishes to dispose of said stock at that date.

"E. J. Bauman."

In consideration of this agreement and in reliance thereon plaintiff purchased the stock, and defendant "procured to be delivered" to him a stock certificate for five shares, for which plaintiff paid the sum of \$500. The transaction was completed on said December 6, 1909. Thereafter, on May 22, 1915, plaintiff through his attorneys notified defendant that he wished to sell and dispose of the stock, and demanded that defendant repurchase the same on July 1 following, as

by the written contract he had agreed to do. The court found that defendant refused to comply with the demand. A tender of the certificate of stock was not made by plaintiff at the time of this demand, but a surrender thereof was understood by plaintiff to be necessary and the demand sufficiently indicated a willingness to surrender the same. Thereafter, on or about July 1, 1916, a year after the date fixed by the agreement for the repurchase, plaintiff again demanded performance of the contract by defendant and then formally tendered back the stock certificate. Defendant again refused to comply with the contract.

Plaintiff then brought this action to recover on the contract. The cause was tried before the court without a jury, and upon findings of facts substantially as here stated judgment was ordered for plaintiff for the amount claimed. Defendant appealed from an order denying his motion for amended findings or a new trial.

The assignments of error present several questions in respect to the admission and exclusion of evidence and the refusal of the trial court to amend its findings of fact and conclusions of law, none of which require extended discussion. We discover no error in the admission of The execution of the written agreement to repurchase was not in dispute on the trial and it was properly received in evidence. While defendant claimed that the writing was not drawn up or signed until after the transaction had been fully completed, the evidence of plaintiff was specific and clear that it was signed and delivered as a part of the transaction, before the completion thereof, and to induce a purchase of the stock, and the findings of the court to that effect are fully supported by the evidence. Defendant also claimed that plaintiff's real purchase was 10 shares of preferred stock, in consideration of which, that the five shares of common stock were thrown in by the company as a gift, for which plaintiff paid nothing. The trial court was fully justified in resolving that claim against defendant. The evidence makes it clear that plaintiff purchased and received five shares of preferred and five shares of common stock, for which he paid \$1,000, less a small discount. Defendant admitted receiving the letter written by plaintiff's attorneys, demanding a performance of the agreement to repurchase the stock, and there was no error in receiving it in evidence. And without further specific reference to points made on this branch

of the case we hold that the findings are fully supported by the evidence, there was no error in the admission or exclusion of evidence, or in denying the motion for amended findings.

It is further contended by defendant: (1) That a breach of the contract gave plaintiff no right of action for the amount therein agreed to be paid for the stock; that the sole remedy in such a case is an action for damages suffered in consequence of the breach; (2) that the contract does not express upon its face the consideration upon which it was founded and is therefore void under the statute of frauds; and (3) that time was of the essence of the contract, and that to charge defendant with liability for a breach thereof it was incumbent upon plaintiff to demand a performance, coupled with a tender of the stock certificate on the date named in the contract, namely, July 1, 1915, and that since no such demand and tender were made on that day defendant is not liable. And further, if the court shall hold that time is not of the essence of the contract, that performance thereof should have been demanded with a tender of stock within a reasonable time after the date fixed by the contract, and that the delay of a year is tendering the stock was unreasonable and a release of defendant.

The questions thus raised and presented are all answered adversely to defendant's contentions by prior decisions of the court. The right of a party holding an option of the kind here in question to recover the amount therein agreed upon was sustained in Lyons v. Snider, 136 Minn. 252, 161 N. W. 532. Practically the identical option was there before the court, and the right of plaintiff therein to recover received careful attention. It is decisive here. In Halloran v. Jacob Schmitt Brewing Co. 137 Minn. 141, 162 N. W. 1082, L.R.A. 1917E, 777, it was held, in respect to the question of the statute of frauds, that a contract made and to be performed in another state, by parties residing therein, must be controlled as to the sufficiency of the written agreement by the law of that state. The contract in the case at bar was made in Iowa by parties residing therein and with reference to the laws thereof. The Iowa statute was not offered in evidence, and we are not advised by the record as to the terms and provisions thereof. We cannot assume that a statement of the consideration is there necessary.

The statement is not necessary at common law. Halloran v. Jacob Schmitt Brewing Co. supra.

In Davis v. Godart, 131 Minn. 221, 154 N. W. 1091, we held that a party holding an option for all practical purposes substantially like that here before us, has a reasonable time after the date fixed by the option to return the property and demand the price agreed upon; and further that a year after such date was not an unreasonable delay. Several authorities are cited sustaining that view of the law in cases involving options exactly like that in the case at bar. That decision would seem to dispose of defendant's contention that time was as a matter of law of the essence of this contract, as well as the further claim that there was an unreasonable delay in tendering back the stock. We so hold, though it is not necessary to rely wholly upon that case. the case at bar there was a demand by plaintiff that defendant take back the stock and pay the agreed amount, and this was made a short time prior to the date fixed by the contract, which defendant ignored and refused to comply with. While this demand was not accompanied by a tender of the stock, defendant's attitude in the matter indicates clearly that such tender would have been a useless ceremony; he would have refused performance had the tender been made. The tender was subsequently made, though about a year later, and defendant again refused to take it back, but not on the ground that the delay in tendering it had prejudiced him in any way, substantially or otherwise. In view of this situation it seems clear that plaintiff did all that was reasonably necessary to apprise defendant of his election to return the stock, to which defendant according to his own testimony turned a deaf ear.

There is some suggestion that defendant was acting as the agent of the corporation in selling the stock to plaintiff, and is therefore not personally liable. The parties are in dispute as to the fact and the trial court made no findings thereon. However, it may be conceded that an agent, acting within the scope of his authority, who enters into a contract for his principal, the agency being known to the opposite party, is not personally liable thereon. 1 Dunnell, Minn. Dig. § 217. But the rule can have no application to the case at bar. The contract upon which this action is founded does not purport to have been executed on behalf of the corporation, but on its face appears to be the personal obli-

gation of defendant. The record will not justify the conclusion that defendant had actual authority to bind the corporation to a repurchase of the stock, and no implied authority appears from the facts as here presented. It must therefore be held that the option to return the stock was defendant's personal contract.

Order affirmed.

K. B. NELSON v. EDWARD F. BERKNER.1

February 8, 1918.

No. 20,683.

Vendor and purchaser — fraud — judgment notwithstanding verdict denied.

1. In this action to recover what was paid on a land purchase contract, alleged to have been induced by the alleged false and fraudulent representations of the defendant, the court rightly denied the motion for judgment in defendant's favor notwithstanding the verdict.

Same - questions for jury.

2. Misrepresentation of acreage of the cultivated portion as well as the distance to the schoolhouse were for the jury, notwithstanding the fact that plaintiff had seen the farm.

Same — evidence of soil and value admissible.

3. No assignment of error reaches the misrepresentation that the farm was as good as any in the county, and upon that issue it was not error to receive evidence as to the character of the subsoil and market value of the farm.

Same - evidence of promises at variance with written contract.

4. Evidence of fraudulent promissory representations made with no intention to keep them and solely for the purpose of inducing another to enter a contract may be proven though at variance with the written contract.

Same - rescission of contract.

5. But such representations are not grounds for rescission when the written contract, to the promisee's knowledge, reveals the falsity of the promise, for he cannot then be said to have relied thereon in entering the contract.

¹Reported in 166 N. W. 347.

Same.

6. If, however, such a promise is based upon false representations in respect to existing facts, made in connection with the promise, it affords a ground for rescinding the contract induced thereby.

Assignment of error.

7. Defendant is not in position to assign error upon the submission of an issue withdrawn from the jury.

Action in the district court for Brown county to recover \$4,153.50 paid on a contract for the purchase of a farm. The answer alleged that prior to making the agreement plaintiff had full opportunity to examine the farm and the soil and did so on several occasions, and made his agreement with full knowledge of all facts pertaining thereto, and went into possession and farmed the land during the year 1916 and derived the benefit therefrom in crops and produce to the value of at least \$2,000; that defendant made no misrepresentations of any kind in the sale of the farm. The reply alleged the crop raised in 1916 did not exceed in value \$1,000. The case was tried before Olsen, J., who when plaintiff rested denied defendant's motion to dismiss the action, at the close of the testimony denied his motion for a directed verdict of no cause of action, and a jury which returned a verdict for \$2,494.26. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Pfaender & Erickson, for appellant.

Albert Hauser, for respondent.

HOLT, J.

Plaintiff, claiming to have rescinded the contract for the purchase of a farm from defendant because of the latter's fraud, brought this action to recover the part of the purchase price paid. The verdict was for plaintiff. Defendant appeals from the order denying his motion in the alternative for judgment notwithstanding the verdict or a new trial.

Plaintiff, a farmer tenant from Iowa, was induced by defendant's agent to come to Brown county, Minnesota, in the fall of 1915, to look at farms in the vicinity of Sleepy Eye with a view to purchasing. He was shown defendant's farm of 197 acres, among others. He did

not become interested. A few weeks thereafter defendant sent an agent down to bring him back. He came to Sleepy Eye, and, the same afternoon, was taken by defendant to this farm, and to another not far from it. In the morning he decided to again examine the farm in question. Defendant took him there in an autobmobile. He returned to Iowa and notified defendant and his agent that he would not invest. Shortly thereafter defendant went to Iowa, found plaintiff in his home, and persuaded him to buy the farm. A contract evidencing the terms of sale was executed, it bears date October 26, 1915. Therein it was agreed that \$24,000 should be paid for the farm, \$3,000 of which was to be paid upon the execution of the contract and \$21,000 on or before March 1, 1926, with interest at 5 per cent, payable annually. It was also provided that in case plaintiff failed to make the payments the contract might be terminated at the election of defendant, in which case the payments made thereunder should be retained by defendant in satisfaction of the damages sustained by the breach. Plaintiff paid the \$3,000 as agreed.

The misrepresentation pleaded and submitted to the jury related to the number of acres under cultivation; the distance to the schoolhouse; the worth of the farm as compared with others in Brown county, and the promise that, in case plaintiff could not make a success of farming the land the first year, the \$3,000 paid with interest should be refunded. These issues were submitted in a clear, concise and legally accurate charge which is not challenged. But by motion for judgment notwithstanding the verdict, and by proper objections and motions to strike out testimony bearing upon the different misrepresentations alleged, except the one whether the farm was as good as others in the county, and exceptions taken to the rulings, defendant preserved his right to assign errors thereon in this court.

That the motion for judgment notwithstanding the verdict was rightly denied will appear from the conclusions reached upon the errors assigned on the rulings at the trial.

We are of opinion that the evidence upon the alleged misrepresentation of the acreage under cultivation in the 120-acre tract lying north of the road passing through the farm, made a fair question for the jury. Although plaintiff had been upon the land three times before the contract was made, and admitted that he could fairly well judge acreage, it is to be remembered that at neither of the times when he visited the farm did he entertain any marked intention to buy. Therefore when he came to the point of buying, and not being where he could again make an investigation as to matters appearing of importance to him, it is not to be wondered at that he was uncertain as to the area of plow land and should make inquiry. Nor is it unreasonable that he should then have a right to rely upon statements of defendant, the owner, in reference thereto. That there was about 40 acres less plowland in the 120 acre tract than represented was certainly a material misrepresentation. We are not inclined to follow Van Horn v. O'Connor, 42 Wash. 513, 85 Pac. 260, it not being in accord with our own decisions of Stearns v. Kennedy, 94 Minn. 439, 103 N. W. 212; Lang v. Merbach, 96 Minn. 431, 105 N. W. 415.

What has been said concerning the representations in relation to the acreage of the plow land, applies to those relating to the distance to the school. It was for the jury to determine whether plaintiff understood, and had the right to understand, that the distance stated was from the dwelling house to the schoolhouse; if not, there was no misrepresentation in this respect.

No assignment of error directly questions the propriety of submitting to the jury whether defendant represented the farm to be as good as any in Brown county. Upon this issue it cannot be held that samples of the soil from the farm were erroneously received. The same may be said as to the evidence of value. It is plain that the representation related to the worth and adaptation of the land for farming purposes—that it was as good for general farming as that of other farms in the county. As bearing on the truth or falsity of that proposition, the kind of soil and subsoil was important. And the market value, in the opinion of those qualified to judge and having knowledge of soil conditions, tends to prove whether this farm was as good as other farms. It was for the jury to say, under all the circumstances, whether this alleged misrepresentation was mere trade talk, or made and understood as a material statement upon which plaintiff could rely in entering the contract.

The chief attack upon the rulings of the trial court arises out of a refusal to sustain objections to evidence tending to establish fraudulent

promissory statements and not granting defendant's motion to strike out the testimony received upon that issue. As a general rule unfulfilled promises as to future acts or events support neither an action for deceit nor avail as grounds for rescinding a contract induced by such promises. But there is ample authority to sustain the proposition that a promise as to a future act, made with no intention of keeping it, and solely to induce another person to enter a contract, is a legal fraud which gives such person the right to rescind. See cases cited in note to Cerny v. Paxton & Gallagher Co. 10 L.R.A.(N.S.) 640; Mutual Reserve Life Ins. Co. v. Seidel, 52 Tex. Civ. App. 278, 113 S. W. 945; Braddy v. Elliott, 146 N. C. 578, 60 S. E. 507, 16 L.R.A. (N.S.) 1121, 125 Am. St. 523. This is the rule in this state. Albitz v. Minneapolis & Pac. Ry. Co. 40 Minn. 476, 42 N. W. 394; Hodsden v. Hodsden, 69 Minn. 486, 72 N. W. 562; McElrath v. Electric Inv. Co. 114 Minn. 358, 131 N. W. 380; Cox v. Edwards, 120 Minn. 512, 139 N. W. 1070; Edward Thompson Co. v. Schroeder, 131 Minn. 125, 154 N. W. 792.

In the Albitz case the promissory representation upon which the decision was rested contradicted no provision in the contract, while here it is claimed that the promise to pay back the \$3,000 with interest is inconsistent with the written stipulation that any payments made should be retained by defendant in case plaintiff defaulted. But the rule of evidence that parol testimony may not be received to contradict a written agreement, or to add to or modify its terms, is subject to the exception that, where the fraudulent or false representation of the one party procured the other party's signature, the representation may be proven for the purpose of annulling or rescinding the contract, no matter how variant with its terms. In Edward Thompson Co. v. Schroeder, supra, the Chief Justice said: "The point that defendant is precluded from showing the fraud by reason of the clause in the contract that no representations had been made except as stated in the contract is disposed of by the case of General Electric Co. v. O'Connell, 118 Minn. 53, 136 N. W. 404." It ought not to make any difference on this proposition whether the fraudulent statements relate to the present or to the future.

The civil code of California (section 1572)¹ declares a promise made with no intention to keep it an actual fraud. This accords with what

¹[2 Kerr (1907).] 189 M.—20

had been held to be the law in this state in the absence of a statute, at least for the purpose of rescinding a contract induced by such promissory statements. In Langley v. Rodriguez, 122 Cal. 580, 581, 55 Pac. 406, 68 Am. St. 70, a written contract was entered into whereby Rodriguez agreed to sell his crop of raisin grapes for two cents per pound, payments to be made upon delivery of the grapes. He did not deliver; and when sued for breach of contract the defense was made that the purchaser, to induce Rodriguez to sign the contract, promised to advance \$350 of the purchase price to enable Rodriguez to pick and cure the grapes, and that said promise was made fraudulently with no intention of keeping it. After stating that the promise was in conflict with the terms of the written contract, and, if honestly made, the rule forbidding proof of contemporaneous oral agreements to detract from the writing applied; but, when not so made, the court said: "Cases are not infrequent where relief against a contract reduced to writing has been granted on the ground that its execution was procured by means of oral promises fraudulent in the particular mentioned, however variant from the terms of the written engagement into which they were the means of inveigling the party (Newman v. Smith, 77 Cal. 22, 26, [18 Pac. 791], and authorities cited; Hays v. Gloster, 88 Cal. 560 [26 Pac. 367])." Rheinganz v. Smith, 161 Cal. 362, 119 Pac. 494, Ann. Cas. 1140, involved a contract for the sale of lands by Rheinganz to Smith. The former had given another party an option to buy the lands which Smith knew had not expired when he induced Rheinganz to sell to him. The option was taken up, and Rheinganz sued to cancel the contract with Smith on the claim that, when Smith paid the earnest money of \$1,000 on the deal and received the contract of sale, he promised to cancel the same in case the option was taken up by the party who held it. There was some evidence that when Smith made the promise he intended to breach it, and that it was made to induce Rheinganz to enter the contract; but as there was no averment in the complaint to that effect the trial court was reversed, and the case remanded with direction to allow an amendment of the pleading so as to make the fraudulent promise testified to available as a ground for relief.

Our conclusion is that the rule excluding proof of oral representations or statements to vary or contradict a written agreement is not applicable to fraudulent oral representations whereby the one party induced the other to enter the contract, provided these are such that the other party might rely thereon.

But it does not follow that every fraudulent promissory representation will serve as basis for rescission of a contract induced thereby, any more than that every misrepresentation of existing condition does. It is always a necessary element in the rescission of a contract for fraud that the one claiming the right to rescind relied upon the truth of the representations, having no knowledge of their falsity or fraudulent character. If in a written contract for the sale of a horse the age was stated to be 10 years, it goes without saying that the buyer who knew that the contract so read when he signed, cannot rescind on the claim that he was induced to enter the agreement by the seller's falsely representing the animal to have been only 3 years of age, for conceding the misrepresentation, the contract itself informed the buyer that it was untrue. So with a fraudulent promissory representation which is plainly contradicted by the undertaking or the stipulations in the written agreement. The promisee would then know that the promise was false, or could not be kept, if what was written was to have any effect, and consequently could not rely thereon. Therefore it is not often that a fraudulent promissory representation in respect to the subject matter or the terms of a written contract, standing alone, affords ground for rescission. In Banque Franco-Egyptienne v. Brown (C. C.) 34 Fed. 162, 192, Judge Wallace says: "Promissory statements may be made in terms which imply that a certain condition of things exists at the time, and form the basis of the * * * future * * * things. When they are of this description, if they are intentionally false, they are fraudulent, and form the basis of a right of rescission."

Under this rule, which to us seems reasonable, the court did not err when submitting the alleged promissory representation to the jury's determination. The substance of this representation was that if plaintiff would buy the farm and run it for a season or a year and if he failed to make it pay, or was dissatisfied with the result, the cash money which would be paid, and was paid, upon the execution of the contract would be refunded with interest. Defendant testified: "I told him (plaintiff) if he would farm that right and put out stock there I would buy that

farm back and pay him back what he paid for it. * * * I told him if he would go on there and stock that farm up and farm it right I would guarantee he would never lose a cent on it." Whether the promise was conditioned as claimed by plaintiff or as claimed by defendant was for the jury. Then the jury could find that in that connection defendant represented the farm to be as good, meaning of course for raising crops, as any farm in Brown county, when, in fact, the subsoil was gravel and sand, which farmers generally consider less productive than clay subsoil; also that there was 40 acres more plow land than there actually was. In that situation, the promise, no doubt, was considered by plaintiff as being based upon the representations in respect to the worth and productiveness of the farm as compared with the good farms of Brown county and the quantity thereof under cultivation. If the truth in these respects had been told, plaintiff would have known that he could not carry out the contract and pay the interest of the unpaid purchase price, taxes and expenses, to say nothing of the balance of the purchase price, and that the promise was false and fraudulent. The jury could find that there was a fraudulent promise predicated upon misrepresentations concerning the productiveness and cultivated acreage of the farm.

The court withdrew the alleged misrepresentations of the market value of the farm from the jury, ruling that the evidence received on that issue was mere trade talk, so that defendant has no cause for complaint on that feature of the case.

No point is made upon the timeliness of the offer to rescind. All the fraudulent statements were interwoven in the one conversation at which the contract was signed, and we assume defendant takes the sensible view that plaintiff did not need to take steps to rescind until he knew the extent of the falsity of the representations upon which he relied.

Judgment affirmed.

MARY POWERS v. OLE O. WILSON.1

February 8, 1918.

No. 20,686.

Garnishment of insurance company — case followed.

1. Judgment having been entered against defendant upon a claim against which the casualty company had insured him under a policy substantially the same in effect as the policy considered in Patterson v. Adan, 119 Minn. 308, the liability of the company upon its policy was subject to garnishment under the xule announced in that case and followed in subsequent cases.

Insurance — insurer not released by insured's failure to furnish supersedess bond.

2. As the policy required the casualty company to defend the action at its own expense and contained no provision requiring defendant to furnish a supersedeas bond in case of appeal and the company accepted and used a bond for costs, his failure to furnish a supersedeas bond did not release the company from liability.

Same — conditional settlement by insured not within terms of policy.

3. The verdict was for \$12,500; the policy for \$5,000. An appeal was taken to this court without giving bond to stay proceedings. Thereafter plaintiff entered judgment and issued an execution under which she seized all of defendant's property. Defendant then made an agreement for settlement conditioned upon the company paying the amount of the policy. The company refused to pay and continued the litigation to a final conclusion. Held that making this conditional agreement did not release the company as its rights were not affected thereby.

After the former appeal, reported in 138 Minn. 407, 165 N. W. 231, plaintiff entered judgment against defendant and garnisheed Georgia Casualty Company. That company made disclosure that its liability for loss on account of an accident resulting in bodily injuries to one person was limited to \$5,000. Plaintiff's motion for judgment on the disclosure in the sum of \$5,134.77 was granted, Haupt, J. From the judg-

¹Reported in 166 N. W. 401.

ment entered pursuant to the order for judgment, Georgia Casualty Company appealed. Affirmed.

Denegre & McDermott and Harry S. Stearns, for appellant. John J. Kirby, for respondent.

TAYLOR, C.

Plaintiff brought suit against defendant for injuries sustained in an automobile accident and recovered a verdict for \$12,500. An appeal was taken to this court from an order denying a new trial, and the order was affirmed on condition that the verdict be reduced to the sum of \$10.000. Powers v. Wilson, 138 Minn. 407, 165 N. W. 231. In her present brief plaintiff states that she has accepted and complied with the condition. The Georgia Casualty Company had issued a policy to the defendant, insuring him against such claims to the amount of \$5,000, and when the suit was brought took charge of and conducted the defense under a provision in the policy which authorized it to do so. As the amount involved exceeded the liability of the company under its policy, defendant, at the suggestion of the attorneys for the company, employed another attorney to represent him personally. This attorney consulted and advised with the attorneys of the company during the litigation, but took no active part in its conduct or management. When the appeal was taken to this court defendant gave a bond for costs but no supersedeas bond was given. Thereupon plaintiff entered judgment upon the verdict and shortly thereafter garnisheed the casualty company. Upon the disclosure and the evidence taken in connection therewith, the district court rendered judgment against the casualty company as garnishee for the full amount for which it was liable under its policy, and from this judgment the casualty company has taken the present appeal.

The only question presented by the assignment of error is whether the disclosure and the evidence submitted in connection with it are sufficient to sustain the judgment.

The company contends that it is not liable upon the policy, for the reason that the policy provided that no action should be brought thereon until a final judgment had been rendered against defendant and had been actually paid by him. Although this provision in this policy differs somewhat from the provision considered in Patterson v. Adan, 119 Minn.

308, 138 N. W. 281, 48 L. R. A. (N. S.) 184, we are of opinion that it is substantially the same in effect, and falls within the rule announced in that case and subsequently applied in Mahr v. Maryland Casualty Co. 132 Minn. 336, 156 N. W. 668, and Standard Printing Co. v. Fidelity & Deposit Co. 138 Minn. 304, 164 N. W. 1022, to which we adhere.

. The company also contends that it is not liable for the reason that defendant failed to furnish a supersedeas bond and thereby stay proceedings upon the verdict.

The policy provides that "the company will, at its own cost, defend such suit in the name and on behalf of the assured." provision the attorneys for the company took full control of the defense to the action and carried it on as they saw fit with such assistance as defendant and his attorney were able to give them. Defendant was unable to furnish a supersedeas bond, but, as the result of a conference with the attorneys of the company, furnished a bond for costs which the company accepted and used in perfecting the appeal. The company insists that it demanded a supersedeas bond which defendant refused to furnish; the defendant denies this, and, so far as this question of fact is of importance, the order for judgment must be considered as a finding against the contention of the company. However this may be, the policy provides that the company shall defend the suit "at its own cost," and contains no provision requiring the assured to furnish a bond of any kind, and nothing which can be construed as forfeiting his rights under the policy for failure to do so.

The company also contends that defendant made a settlement of the suit in violation of the terms of the policy and thereby released the company from liability.

The following is the provision of the policy which defendant is claimed to have violated: "The assured, whenever requested by the company, shall aid in effecting settlements, securing information and evidence, the attendance of witnesses and in prosecuting appeals, but the assured shall not voluntarily assume any liability or interfere in any negotiation for settlement, or any legal proceeding, or incur any expense, or settle any claim, except at his own cost, without the written consent of the company previously given."

After the appeal had been taken and the judgment entered upon the verdict, the plaintiff not only garnisheed the company but also issued an execution upon the judgment under which the sheriff closed defendant's store and seized all his property. Thereafter defendant endeavored to make a settlement of the judgment in order to resume his business. He opened negotiations with plaintiff's attorney and requested the attorneys for the company to ascertain from him the best terms upon which the judgment could be settled. They communicated with plaintiff's attorney and ascertained the terms upon which he insisted and reported them to defendant. Thereafter defendant agreed with plaintiff and her attorney on terms of settlement conditioned upon the payment by the company of the full amount of its policy, and executed a deed and other papers to convey the property which plaintiff had agreed to accept in satisfaction of the amount to be paid by defendant over and above the amount of the policy. The company, however, refused to pay the amount of the policy and prosecuted the appeal to a final determination. As the settlement was conditioned upon the payment by the company of the amount of the policy and the company refused to make this payment, the settlement has not been completed and has never gone into effect. The deed and other papers executed by defendant are still held by the attorneys and have never been received or accepted by the plaintiff. This tentative settlement did not interfere with the management and control of the litigation by the company, nor hinder it in any manner from continuing such litigation to the end. The company in fact did continue the litigation to a final conclusion without hindrance or interference of any kind, and we fail to see wherein the making of this conditional agreement impaired or affected its rights in any way.

Judgment affirmed.

STATE EX REL. GEORGE W. BURROWS v. P. E. TRUAX AND OTHERS.

SAME v. SAME.1

February 8, 1918.

Nos. 20,693, 20,722.

Drain - hearing before county board - witnesses need not be sworn.

1. The board of county commissioners may, in county ditch proceedings, hear parties and witnesses who appear before them without administering an oath.

Same - statute not mandatory.

2. The statute which authorizes them to hear and consider the testimony of parties, viewers and engineers, and other admissible testimony, is not a mandate to the board to hear no person except under oath.

Upon the relation of George W. Burrows, the district court for Wilkin county granted its alternative writ of mandamus commanding P. E. Truax, as county auditor, and the county commissioners of that county to make and cause to be made in the minute book of the commissioners a true record that at a meeting held on June 20 and 21, 1917, relator and others requested the board that witnesses be sworn and that the request was refused. The separate demurrers of the county auditor and county commissioners were overruled, Flaherty, J., and respondents answered. Relator demurred to the answers, his demurrers were sustained and his motion for a peremptory writ was granted. From the judgment entered pursuant to the order for a peremptory writ, the county auditor appealed. Affirmed.

Upon the relation of George W. Burrows the supreme court granted its writ of certiorari directed to P. E. Truax, as county auditor, and the county commissioners of the county to review proceedings in the

¹Reported in 166 N. W. 339.

district court for Wilkin county relating to the construction of County Ditch No. 31. Affirmed.

- E. H. Elwin and Lewis E. Jones, for appellant.
- W. E. Purcell, Wolfe & Schneller, George D. Smith and Engerud, Divit, Holt & Frame, for respondent.

HALLAM, J.

These proceedings, one in mandamus and one in certiorari, by same relator, arise out of a county drainage ditch case. The relator, appellant in the certiorari case and respondent in the mandamus case, was an objector. At the meeting of the board of county commissioners to consider the matter of the establishment of the ditch, relator and others appeared by attorney and asked that all witnesses be sworn. The board declined and the witnesses were not sworn. After the conclusion of the hearing, the board made an order establishing the ditch. Relator then discovered that the county auditor had made no entry in his record of the request that the witnesses be sworn or of the fact that they were not sworn, and the mandamus proceeding was instituted to compel him to record such facts. The court, after hearing, granted a peremptory writ commanding the auditor to so amend his records. The auditor immediately appealed. Thereafter, relator procured a writ of certiorari to review the proceedings and the determination of the board. court on the return day quashed the writ and in that case relator appealed.

Counsel on both sides have spent much time in argument of questions of practice, all pertaining generally to the question whether relator succeeded or was entitled to succeed in getting the merits of the case before the court. We shall devote no time to these questions. We have little difficulty in holding that the parties to this litigation were entitled to a determination of their lawsuits on the merits rather than upon refined questions of practice.

1. There is but one question that goes to the merits of the case. Relator seeks to have the order establishing the ditch vacated, on the ground that the county board refused to swear the witnesses produced before it. If this was fatal to the validity of the order establishing the

ditch, relator should have relief. If it was not, then relator must fail. We think it was not fatal.

The functions of the county board in a ditch proceeding are primarily legislative and only quasi judicial. The county board is not a court. Its proceedings are not proceedings in court. They are necessarily informal. The members are usually not lawyers. They are not governed by legal rules of evidence. The witnesses are usually for the most part officials, such as engineers and viewers, or parties to the proceeding. Parties appear usually without attorneys. Their contribution to the proceeding will, in practice, be found to be partly argument and partly statement of fact. Unless there is some requirement in the statute to that effect, we think county boards are not required to put under oath those who appear before them. This is the rule as to proceedings before arbitrators. City of O'Neill v. Clark, 57 Neb. 760, 78 N. W. 256; Hopper v. Fromm, 92 Kan. 142, 547, 141 Pac. 175, Ann. Cas. 1916B, 807; Hackney v. Adam, 20 N. D. 130, 127 N. W. 519; Rounds and Hagler v. Aiken Mnfg. Co. 58 S. C. 299, 36 S. E. 714; Hurst v. Funston (Tex. Civ. App.) 91 S. W. 319. There seems more reason for applying it to ditch proceedings.

2. It is claimed the statute does not require that the oath be administered. The statute provides that the board shall "hear and consider the testimony adduced of all parties interested, and the testimony of the viewers and engineers if offered, and other admissible testimony." G. S. 1913, § 5531. It is contended that the use of the word "testimony" of necessity implies that those giving it shall be sworn. We do not regard this as a mandate to the board to hear no person except under oath. Edelstein v. U. S. 149 Fed. 636, 79 C. C. A. 328, 9 L. R.A.(N.S.) 236, was a different sort of case.

In this view of the case, the trial court might well have denied the peremptory writ of mandamus, but we are not disposed to reverse for that reason. This court will not reverse a judgment of the trial court although it is technically wrong, if no substantial benefit is to be accomplished by a reversal. The case is akin to a case where only nominal damages are at stake and no important principle is involved. There is no reversal in such cases. Erickson v. Minnesota & O. P. Co. 134 Minn. 209, 158 N. W. 979.

The judgments in both proceedings are affirmed.

BJARNE OLSEN v. GREAT NORTHERN RAILWAY COMPANY AND OTHERS.¹

February 8, 1918.

No. 20,723.

Owner of chattels estopped from claiming title against innocent buyer.

Where the true owner of personal property allows another to appear as the owner of, and as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, the owner thereof will be estopped from questioning the title of such innocent purchaser to such property.

Action in replevin in the municipal court of Minneapolis. The case was tried before Bardwell, J., who made findings and dismissed the action. From an order denying his motion to amend the findings or for a new trial, plaintiff appealed. Reversed.

J. E. Brill, G. E. Bauers and Arthur. F. Weller, for appellant. Walter Holsinger and Lew C. Church, for respondent.

QUINN, J.

This is an action in replevin brought in the municipal court of Minneapolis against the defendant railway company to recover possession of a carload of potatoes on its track at the Minneapolis Transfer. Subsequently, upon motion of the railway company stating that it had no interest in the property, and asking that Elmer Rand and the Gamble-Robinson Company be interpleaded and made parties defendant, an order to that effect was duly made. The case was tried to the court without a jury, which resulted in findings that the plaintiff was not the owner or entitled to the possession of the property, but that the defendent Rand was the owner and entitled to the possession thereof. From an order refusing to amend the findings and denying his motion for a new trial the plaintiff appealed.

1Reported in 166 N. W. 331.

In November, 1915, the defendant Rand was conducting a boarding stable in the city of Minneapolis and kept horses for hire. One Dusenbery had used Rand's teams in unloading and peddling potatoes. Gamble-Robinson Company were wholesalers in the vegetable line and H. A. Hopkins was their manager. Dusenbery had entered into a arrangement with Rand whereby Rand had agreed to furnish the money with which to buy potatoes, and Dusenbery, using Rand's teams, was to peddle them. Thereafter, with Rand's knowledge, Dusenbery went to the office of the Gamble-Robinson Company and talked with Hopkins about buying a carload of potatoes. Hopkins gave him the number of several cars which they had on track at the transfer. After looking the potatoes over Dusenbery returned to the Gamble-Robinson Company's office and entered into an arrangement for the purchase of one car of potatoes at 42 cents per bushel, but, when he came to settle for the same, he did not have the money. Hopkins refused to sell unless the potatoes were paid for, and Dusenbery asked him to hold the matter open until morning; that he had a party who had been putting up some money for him and that he would come back with him. On the following morning, November 9, 1915, Rand, Dusenbery and a tall man who was to help in handling the potatoes, went to the Gamble-Robinson Company's office. As they entered Dusenbery said to Mr. Hopkins that he was ready to settle for the potatoes, or words to that effect. Hopkins then had a delivery order prepared, and while the same was being made out Rand and Hopkins discussed the prospects of the potato market. Dusenbery had given Rand \$50 in currency. Rand then paid Hopkins \$50 in cash, and gave him a check for \$285, the purchase price of the potatoes. Hopkins asked to whom he should give the delivery order, and in Rand's presence, Dusenbery said: "You had better * * * give it to me." The parties then left the office, Dusenbery taking with him the order for delivery of the car of potatoes. Two days later the Gambe-Robinson Company delivered the bill of lading to the tall man who was to assist in handling the potatoes and who was present at the time the potatoes were paid for. On November 11, Dusenbery called upon plaintiff Olsen, and told him he had a car of nice potatoes on the team track of the Great Northern which he would like to sell. After examining the potatoes Olsen bought them from Dusenbery at 35 cents

per bushel, Dusenbery delivering to Olsen the bill of lading with the delivery order. After looking at the bill of lading, Olsen called up the Gamble-Robinson Company and inquired of Mr. Hopkins if it was a good car of potatoes. Olsen then stated to Dusenbery that he would give him a check the following morning in payment for the same, but Dusenbery stated that he wished to use the money that evening, whereupon Olsen again called up the Gamble-Robinson Company and asked Mr. Hopkins to whom he had sold that car of potatoes. He was informed that they had been sold to Dusenbery. Olsen then gave Dusenbery a check for the amount asked for the potatoes. The next morning Rand, having learned that the car of potatoes had been sold, called upon Olsen for the purpose of having payment on the check stopped, but upon inquiry at the bank it was learned that the check had already been cashed. Olsen then called upon the railway company for the delivery of the potatoes, which was refused. He then brought this action to recover possession of the same.

There is no controversy over the facts leading up to the sale of the potatoes to Olsen. It is the contention of the plaintiff that Rand, through his acts and conduct, clothed Dusenbery with every appearance of title to the potatoes short of an absolute bill of sale, and that he is now estopped from questioning Dusenbery's authority to sell the same. Rand testified that he agreed to furnish the money with which to buy the potatoes, that Dusenbery was to peddle them, using Rand's teams. for the purpose, and that Dusenbery went to the Gamble-Robinson Company, under his direction, to see if he could buy potatoes. It is undisputed that on November 8 Dusenbery arranged with Hopkins for the carload of potatoes in question at 42 cents per bushel, and that he was to return on the following morning and bring with him a party who would furnish the necessary money. That on the next morning, November 9, Dusenbery and Rand appeared at the office together, and Dusenbery said to Mr. Hopkins that he was ready to settle for the car of potatoes. Hopkins then looked up the car invoice and figured up the amount of the car which was \$335. He then directed the cashier to make out the delivery order, Exhibit A. Rand then paid Hopkins \$50 in cash and gave him a check for \$285. The delivery order was made out to bearer and delivered to Dusenbery, who took the same with

him when he left the office. Rand concedes that the delivery order was handed to and taken by Dusenbery with his consent. Thereafter the car was transferred to the team track of the Great Northern, and on November 11 Dusenbery procured the bill of lading and called upon the plaintiff Olsen, informing him that he had a car of potatoes upon the team track of the Great Northern, which he would like to sell at 40 or 42 cents per bushel. Olsen then examined the car of potatoes and told Dusenbery that 35 cents a bushel was the most he would pay for them. Dusenbery told Olsen that he would let him know in half an hour. Shortly thereafter he returned and delivered the bill of lading. together with the order of delivery to Olsen, and told him he would accept 35 cents for the potatoes. Olsen then called up Mr. Hopkins at the Gamble-Robinson Company's office and inquired as to whom the car of potatoes had been sold, and was informed that they had been sold to Dusenbery. Then Olsen gave Dusenbery a check for the potatoes. On the following morning Mr. Rand learned of the sale of the car of potatoes and he immediately called upon Mr. Olsen in an attempt to stop payment of the check, but upon inquiry at the bank it was found that the check had been cashed.

It is conceded that Mr. Hopkins honestly believed that Dusenbery was the actual purchaser of the potatoes in question, and that he informed Olsen that he had sold the same to Dusenbery. We are of the opinion that the testimony conclusively shows that the defendant Rand, by and through his acts and conduct, clothed Dusenbery with such apparent ownership and possession of the car of potatoes as to justify the plaintiff in dealing with him therefor. Nor does it appear that the plaintiff was in any way negligent in the premises. Before paying for the potatoes he called up the Gamble-Robinson Company and inquired as to whom they had sold them, and was informed by Mr. Hopkins that they had been sold to Dusenbery. It is well settled "that where the true owner holds out another, or allows him to appear, as the owner thereof, or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected." McNeil v. The Tenth National Bank of City of New York, 46 N. Y. 325, 329, 7 Am. Rep. 341; Kiewel v. Tanner, 105 Minn. 50, 117 N. W. 231, 25 L.R.A.(N.S.) 772; Barnard v. Campbell, 55 N. Y. 456, 14 Am. Rep. 289; Nixon v. Brown, 57 N. H. 34.

Under the facts in this case as they appear from the record, the defendant is estopped from questioning the sale of the potatoes, as against the plaintiff Olsen.

Reversed.

FIRST NATIONAL BANK OF NORTHFIELD v. GALEN H. COON AND OTHERS.¹

February 8, 1918.

No. 20.734.

Judgment - default in violation of court rule - error not to vacate.

On the facts shown, it was error to refuse to vacate a default entered because defendant was not in court when his cases were reached on the calendar for trial.

Action in the district court for Rice county to recover \$815.74 upon two promissory notes. From an order, Childress, J., denying his motion to set aside his default and reinstating the cause upon the trial calendar, defendant appealed. Reversed.

Charles Jaudon Berryhill, for appellant.

R. D. Barrett, for respondent.

Hallam, J.

This case was on the May, 1917, calendar of the district court of Rice county for trial by jury. On the preliminary call of the calendar it was the ninth case for trial. The only answering defendant, Galen H. Coon, lives in St. Paul. His attorney lives on a farm some miles from St. Paul. Plaintiff's attorney resides in Minneapolis. The trial of jury cases commenced Monday, May 14. On the morning of Tuesday, May 15, defendant called the clerk of the court by telephone, was

¹Reported in 166 N. W. 400.

told that the first jury case was still on trial and that defendant's case would probably not be reached before Thursday. Later in the forenoon it became apparent that it might be reached earlier. The clerk made an effort to again get into communication with defendant but failed. Plaintiff's attorney also tried to reach defendant but failed. Neither defendant nor his attorney received any information, in fact, of the changed condition of the calendar until late Wednesday. At 11:40 a. m. Wednesday this case, and two others following it on the calendar between these parties, were taken up out of their order and defendant was defaulted. On Saturday defendant asked for an order to show cause why the default should not be opened. The jury was not discharged until the following Thursday, May 24. The court fixed Friday, May 25; as the return day of the order. After a hearing, the court declined to reopen the cases. Defendant Galen H. Coon appeals.

The big fact is, that defendant has not had a trial of his case on the merits. This is not conclusive because a party may, by neglect, lose his right to a trial on the merits. But the courts will extend much liberality in opening a default, if the party defaulted has acted in good faith and the prevailing party can be made whole by the imposition of terms.

The next important fact is, that these cases were taken up and disposed of out of their regular order. The rules of court provide that cases shall be tried in their order on the calendar. Litigants are entitled to rely on this rule. These cases were advanced ahead of a case which stood earlier on the calendar for trial and which was taken up for trial immediately after defendant was defaulted. Had all cases been taken up in their order on the calendar, defendant's cases would not have been reached earlier than 5:30 p. m. on Wednesday. It is hardly conceivable that the court would, under the circumstances, have defaulted three jury cases at that hour of the day. Defendant was preparing to appear for trial on Thursday morning when he learned he had been defaulted. He acted promptly after discovery of the default. He made application to open the default five days before the jury had been discharged for the term. The cases might have been reinstated and tried at that term of court. Defendant acted in good faith. His answer stated a good defense. He presented some excuse. The time lost by 189 M.—21

the court because of his nonappearance on Wednesday was negligible. Plaintiff could easily have been compensated for any expense or inconvenience by imposition of terms. Defendant should have been allowed a trial on the merits.

Order reversed.

CITY OF ST. PAUL v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY AND ANOTHER.¹

February 8, 1918.

No. 20,738.

Municipal corporation — police power — maintenance of bridge over railroad tracks.

1. A city, in the exercise of its police power, may compel a railway company to construct and thereafter maintain a bridge for the purpose of carrying a street over its tracks, if a bridge is necessary to enable the public to cross such tracks safely and conveniently.

Same - contract to part with police power invalid.

2. The city cannot divest itself of any part of its police power by contract, or otherwise.

Same - judgment pursuant to stipulation invalid, when:

8. A judgment against a municipality, not rendered as the judicial act of a court but entered pursuant to a stipulation of the officers of the municipality, is void if such officers lacked power to bind the municipality.

Same — when stipulation as to matter of law invalid.

4. A stipulation as to a matter of law which affects public interests is not binding upon the courts.

Same — when judgment not a bar to action to compel repairs to bridge.

5. A stipulation that no obligation rested upon defendants to repair the bridge over their tracks here in question stated a conclusion of law, and a judgment to that effect entered pursuant thereto, without the judicial action of a court, is not a bar to a subsequent action by the

¹Reported in 166 N. W. 335.

city to compel defendants to repair such bridge. The subject matter cannot be removed from the domain of the police power of the city by such a stipulation and judgment.

Same - bridge not on defendant's land.

6. There is no basis in the record for the contention that a part of the bridge was built outside the street and upon land owned by the Omaha Company.

Action in the district court for Ramsey county against two railway companies to recover \$6,127.81 expended by plaintiff in rebuilding the Westminster street bridge over their tracks. The separate answers alleged that in a certain mandamus proceeding, where the issues of fact and law were determined by the court, judgment was entered upon the merits, by which it was determined that no obligation rested on the railroad companies to maintain or keep the bridge in repair. The case was tried before Haupt, J., who made findings and ordered judgment in favor of plaintiff for the amount demanded. From the judgment entered pursuant to the order for judgment, defendants appealed. Affirmed.

- J. B. Sheean, M. L. Countryman and Moore, Oppenheimer & Peterson, for appellants.
 - O. H. O'Neill, for respondent.

TAYLOR, C.

In 1915 it became necessary to reconstruct the southerly span of the bridge which carries Westminster street in the city of St. Paul over the tracks of defendants, and the city passed an ordinance requiring defendants to rebuild it. They refused to do so, and thereupon the city rebuilt it and then brought this action to recover the expense incurred. The city recovered a judgment in the district court and defendants appealed.

The defendants rest their case upon the proposition that the city is estopped and barred from maintaining this action by a judgment entered in the district court on May 17, 1899.

To understand the situation a brief reference to the proceedings which resulted in that judgment is necessary. Pursuant to negotiations between officers of the city and officers of the several railway companies,

an agreement was formulated, in 1880, which provided that, whenever the city should direct that a street be carried over the tracks of railway companies within the city by a bridge, the railway companies interested should build the abutments for the bridge and the superstructure over their tracks, and that the city should build the approaches to the bridge and should maintain the bridge and keep it in repair after it was constructed. By its terms this agreement appears to apply to and include all railway companies having tracks within the city. It was signed by the St. Paul, Minneapolis & Manitoba Railway Company, the predecessor in interest of the Great Northern Railway Company. The original agreement seems to have been lost and whether it was signed by any of the other railway companies is not clear and there is no find-. ing as to this fact. It does not appear that the city council ever authorized or directed the execution of the agreement by the city, nor that any city officer ever signed or executed it on behalf of the city. However this may be, the city and the railway companies, or a part of them, proceeded to act under the agreement. In 1881, the city notified defendants to build a bridge over their tracks on Westminster street, and defendants, apparently acting under the agreement, built the bridge now in controversy and completed it in 1882. Thereafter the city maintained the bridge and kept it in repair until 1898. In 1898, the city brought an action to compel defendants to make repairs upon the bridge then necessary. The defendants in their respective answers set forth the agreement above mentioned and asserted that by virtue thereof the duty to repair the bridge rested upon the city and not upon them. The defendants also asserted that their tracks were located in a deep ravine: that the contour of the ground made a bridge necessary irrespective of the location of the railway tracks, and that for that reason no duty rested upon them to construct or maintain a bridge except as imposed by the above agreement. The cause came on for trial and the evidence was taken, but the cause was never submitted to the court for decision. While it was still pending, the city council passed an ordinance which provided for the settlement of various contropersies with the railway companies and contained the following provision concerning this action: "The corporation attorney is hereby authorized and directed to stipulate for and procure the entry of final judgment to the effect that

no duty rests upon either or any or said railway companies to maintain or keep in repair the bridge described in said proceedings and known as the Westminster street bridge, and in and by said judgment affirming and determining that a certain contract between the city of St. Paul and the said St. Paul, Minneapolis and Manitoba Railway Company, bearing date August 23, 1880, is as to said St. Paul, Minneapolis & Manitoba Railway Company, its successors and assigns, a valid and binding contract between said city and said railway company. Said contract is in words and figures following:" The ordinance then set forth in full the above mentioned agreement. Pursuant to the ordinance the city attorney entered into a stipulation with the defendants which recited the pendency of the action, the passage of the ordinance and its acceptance by the defendants, the making of the agreement, and then continued: "And whereas, upon the evidence received upon the trial of this action, the city of St. Paul, the petitioner herein, is willing to concede that no obligation or duty rests upon either or any of the defendant companies in this proceeding to maintain or keep in repair the said Westminster street bridge, and by the terms of said ordinance has directed its corporation attorney to stipulate for and procure the entry of final judgment in favor of said railway companies, as provided in said ordinance. Now therefore, it is hereby stipulated that judgment may be ordered in favor of said St. Paul, Minneapolis & Manitoba Railway Company, said Great Northern Railway Company and said Chicago, St. Paul, Minneapolis and Omaha Railway Company, and against said petitioner, the city of St. Paul, in the form hereto annexed."

Pursuant to the stipulation and without findings of any kind, the court entered judgment, on May 17, 1899, in the form prescribed by the stipulation. This is the judgment upon which defendants rely. It declares "that no obligation or duty rests upon" either of the defendants "to maintain or keep in repair the bridge described in the pleadings in this cause and known as the Westminster street bridge in said city of St. Paul, or any part thereof." It then sets forth in full the above mentioned agreement and declares that it is valid and binding between the city and the St. Paul, Minneapolis & Manitoba Railway Company and its successors. As set forth in the judgment, the agreement is

signed only by the Manitoba Company, and the judgment does not in terms declare it valid or binding as to the Omaha Company.

It has long been settled that the city, in the exercise of its police power, may compel a railway company to construct a bridge for the purpose of carrying a street over its tracks whenever a bridge is necessary to enable the public to cross such tracks safely and conveniently, and may also compel the company to maintain the bridge thereafter and keep it in repair, and that this is a power of which the city cannot divest itself by contract or otherwise. State v. Minnesota Transfer Ry. Co. 80 Minn. 108, 83 N. W. 32, 50 L.R.A. 656; State v. St. Paul, M. & M. Ry. Co. 98 Minn. 380, 108 N. W. 261, 28 L.R.A. (N.S.) 298, 120 Am. St. 581, 8 Ann. Cas. 1047; State v. Northern Pacific Ry. Co. 98 Minn. 429, 108 N. W. 269; Northern Pacific Ry. Co. v. State, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. ed. 630; State v. Chicago, M. & St. P. Ry. Co. 135 Minn. 277, 160 N. W. 773, L.R.A. 1917C, 1174.

The rule is stated in 6 R. C. L. 190, § 189, as follows: "The state cannot barter away the right to use the police power, and cannot by any contract divest itself of the power to provide for acknowledged objects of legislation falling within the domain of the police power. Accordingly the legislature cannot surrender or limit such powers either by affirmative action or by inaction, or abridge them by any grant, contract or delegation whatsoever. The discretion of the legislature cannot be parted with any more than the power itself. These principles apply to the police power delegated to municipal corporations; thus the general police power possessed by a city is a continuing power, and is one of which the city cannot divest itself, by contract or otherwise."

A judgment against a municipality, not rendered as the judicial act of a court but entered pursuant to a stipulation of the officers of the municipality, is of force and effect only so far as such officers had authority to bind the municipality. The fact that by consent of the municipal officers an agreement or stipulation made by them has been put in the form of a judgment, in an attempt to give it the force and effect of a judgment, does not cure a lack of power in the officers to make it, and if such power be lacking the judgment as well as the stipulation is void. Kelley v. Milan, 127 U. S. 139, 8 Sup. Ct. 1101, 32 L.

ed. 77; Union Bank v. Commissioners, 119 N. C. 214, 226, 25 S. E. 966; Lawrence Mnfg. Co. v. Janesville Cotton Mills, 138 U. S. 552, 11 Sup. Ct. 402, 34 L. ed. 1005.

This court had the agreement of 1880 and the judgment now in question under consideration in State v. Great Northern Ry. Co. 134 Minn. 249, 158 N. W. 972, and held that the agreement was void as an attempt to divest the city of a portion of its police power, and that the judgment was also void insofar as it attempted to give validity to the void agreement, or to divest the city of any part of its police power. In the present action defendants concede the invalidity of the agreement and also the invalidity of the judgment to the extent stated, but contend that the part of the judgment which determined that no duty or obligation rested upon them to maintain or repair the bridge is severable from the remainder of the judgment, and is valid and precludes the city from maintaining the present action. We are unable to sustain this contention.

Even if we were to concede that the judgment determined that, under the conditions then existing, it was more feasible and practicable to carry the street over the ravine by a bridge than by an embankment regardless of the railway tracks, it would not preclude the city from showing that, under present conditions, if no railway tracks crossed the street it would be more feasible and practicable to replace the bridge, or the portion of it in question, by an embankment than to reconstruct it and keep it in repair. State v. Great Northern Ry. Co. 134 Minn. 249, 158 N. W. 972, and cases cited therein. The city presented evidence tending to prove that such was the fact, and defendants offered none to controvert it. The court made no specific finding showing that conditions had changed since the former action, but found that if no railway tracks extended across the street it would be feasible and practicable to construct an embankment instead of a bridge. But passing this point, the statement in the ordinance and in the stipulation that no obligation or duty rested upon defendants to maintain or repair the bridge is a pure conclusion of law not supported by any statement of facts. The city officers did not stipulate that the character of the ravine made a bridge more feasible and practicable than an embankment. but merely that no duty to maintain or repair the bridge rested upon

the companies. So far as appears their action may have been based solely upon the supposed validity of the void agreement of 1880. But whatever may have been the inducing cause, they stipulated to a conclusion of law which if recognized and enforced will operate to curtail the police power of the city. While stipulations which affect only the individual rights of the parties thereto may be given effect, stipulations in respect to matters of law, especially if they affect public interests, are not binding upon and will be disregarded by the courts. 20 Enc. Pl. & Pr. 607; 36 Cyc. 1285.

The conclusion of law that no obligation or duty rested upon defendants to maintain or repair the bridge could not be established and made binding by the stipulation, nor by the judgment entered pursuant to the stipulation, and this judgment does not debar the city from maintaining the present action. The matter of requiring the railway companies to keep the bridge in safe and proper condition for public use cannot be removed from the domain of the police power of the city by such proceedings. Whether the city would be bound by a stipulation as to the physical conditions theretofore existing is not determined as no such stipulation was made.

The claim was made at the argument that, at the time the bridge was built, the Omaha Company owned the land upon which the northerly end of the bridge rested; that as a part of the bridge was not within a public highway but upon the land of the Omaha Company the city was without power to compel the companies to build it; that both the city and the companies acted under and pursuant to the agreement of 1880 in constructing the bridge, and that in consequence of these facts the agreement became valid and binding as between the city and the Omaha Company under the doctrine of State v. Chicago, St. P. M. & O. Ry. Co. 85 Minn. 416, 89 N. W. 1. The record fails to furnish any basis for this contention. The pleadings expressly admit the existence of the street as a public highway and that it had been carried over the tracks of the companies by a bridge for many years. No question was raised either in the pleadings or in the evidence to the effect that a part of the bridge was not within a public highway. Neither is this \ question raised by any assignment of error. At the trial defendants offered in evidence the judgment roll in the former action, and in connection therewith offered a transcript of the evidence taken in that action, not as original evidence in this action, but for the purpose of showing the questions which they insisted had been determined in the former action. This transcript discloses that evidence was presented in that action to the effect that the northerly end of the bridge rested upon land owned by the Omaha Company at the time the bridge was built. But no such evidence was offered in the present action, and the transcript having been offered merely for the purpose of showing the matters claimed to have been determined by the judgment in the former action, cannot be given effect as evidence tending to prove this fact in the present action. There is not only no evidence in the present case to prove that the Omaha Company ever owned any of the land upon which the bridge rests, but the express admissions in the pleadings precluded defendants from asserting that such was the fact.

We are of opinion that the trial court reached the correct conclusion and the judgment is affirmed.

EDWARD D. RYDEEN v. COUNTY OF CLEARWATER AND OTHERS.1

February 8, 1918.

No. 20,752.

County — approval of voters required for issue of bonds for court house.

Clearwater county now owns a court house and therefore cannot issue bonds for the erection of a new one without the approval at an election of a majority of the voters of the county. G. S. 1913, §§ 1854, 1855. G. S. 1913, § 1934, does not apply.

Action in the district court for Clearwater county to restrain the county commissioners from entering into a contract for the construction of a court house for the county. The case was tried before Stanton, J., who made findings and granted a permanent injunction. From an order denying their motion to amend the findings and conclusions or for a new trial, defendants appealed. Affirmed.

E. E. McDonald and O. T. Stenvick, for appellants.

Montreville J. Brown and Emil T. Evenson, for respondent.

Reported in 166 N. W. 334.

BUNN, J.

Plaintiff is a taxpayer and resident of Clearwater county. He brought this action to enjoin the county commissioners, auditor and treasurer, from entering into a contract for the construction of a court house, and from issuing bonds to defray the cost of construction. The trial resulted in a decision for plaintiff, permanently restraining defendants from entering into a contract for the construction of a court house, and from issuing and selling the bonds of the county for the purpose of raising money for such construction, until the question whether such bonds shall be issued has been submitted to the voters of the county, and a majority have voted in favor of such issue. Defendants moved for amended findings and for a new trial, and appeal from an order denying this motion.

The question is whether the county could legally issue bonds for the construction of a court house, as its officers proposed to do, without the vote of a majority of the voters of the county. If Clearwater county does not now own a court house, it is conceded that it may, under G. S. 1913, § 1934, issue bonds to raise money to erect one without submitting the question to a vote of the people. If, however, Clearwater county now owns a court house, section 1934 does not apply, and sections 1852, 1854 and 1855, G. S. 1913, do. Under the provisions of the last named sections of the statute, the county could not issue bonds for the erection of a court house without the approval, first obtained, of a majority of the voters at an election at which the proposed issue is submitted for approval or rejection.

Therefore the question before us is:

Does Clearwater county now own a court house? If it does, the injunction was properly granted.

Insofar as the question is one of fact, the findings of the trial court, which we hold are amply sustained by the evidence, will be taken as the basis of our decision. They are in substance as follows:

August 22, 1905, the village of Bagley, county seat of Clearwater county, conveyed to the county by quitclaim deed lot 1, block 5 of Bagley, "so long as the same shall be used for court house and county purposes, and upon the cessation of said described premises being used for said purposes above mentioned, the title to said premises shall there-

upon revert to the party of the first part." No other or different convevance of said lot or the building then situated thereon has ever been made. The building was a two-story frame structure which had theretofore been used by the village as a village hall and engine house. In the same year this building was, by residents of the village, removed from lot 1, block 5, to block 9; First Addition to the village of Bagley. This block was then and has been ever since owned by the county. The county. commissioners constructed partitions in the building, so as to provide offices for county officials, placed therein additional doors, windows and chimneys, built a stone foundation under the building and constructed and added to the building two fire-proof vaults. The aggregate cost of these improvements was about \$1,600. The building has ever since been used as a court house and has and does now provide offices for all of the county officers, except the sheriff, county attorney and superintendent of schools, and has on the second floor a large room ' which is used as a court room. The court found that this building was a court house and was owned by Clearwater county.

It is contended that the county does not own a court house for two reasons: (1) The character of the building and of its use by the county is not such as makes the building a court house; (2) the county does not own the building.

- 1. We will dispose of the first contention by saying that the building was a court house. It was not an ideal one, but it sufficed for 12 years. See Upton v. Strommer, 101 Minn. 97, 111 N. W. 956.
- 2. The claim that the court house was not owned by the county is based upon the fact that the building was originally standing on the lot conveyed by the village to the county by the deed containing the condition stated. The building seems to have been removed to its present location without any objection on the part of the village. The county practically remodeled it, and used it 12 years for a court house and county building without the slightest hint of objection from the village. The village is making no objection now, and we may safely assume that it never intends to, even if it could reasonably make some claim, which we doubt. We hold that the county owns the court house within the meaning of G. S. 1913, § 1934. Upton v. Strommer, supra.

It follows that the county officers were properly enjoined from issu-

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ing bonds for the construction of a new court house without a favorable vote of the electors. The injunction is a bit broader than this however, restraining the erection of a court house. But it is not claimed that the county had funds in its possession applicable to this use, and G. S. 1913, § 1852, prevented incurring indebtedness without the issue of bonds. We see no reason for modifying the decision in the respect mentioned.

Order affirmed.

Brown, C. J., took no part

IN THE MATTER OF JUDICIAL DITCH No. 2, ITASCA COUNTY.

SAMUEL A. ANDERSON v. J. S. PILLSBURY AND COMPANY.1

February 15, 1918.

No. 20,405.

Judicial ditch — benefit not greater than cost — evidence.

The evidence justified the court in finding that the benefits to be derived from the proposed ditch would not exceed the cost of constructing it.

Samuel A. Anderson and others petitioned the district court for Itasca county for the construction of a certain ditch designated as Judicial Ditch No. 2. The order establishing the ditch was set aside and the engineer directed to file an amended report. The matter was thereafter heard by Stanton, J., who denied the petition. From the order denying the petition, petitioners appealed. Affirmed.

Duxbury & Duxbury and William A. Watts, for appellants.

Thwing & Rossman, A. L. Thwing and Taylor & Anderson, for respondents.

TAYLOR, C.

This is an appeal from an order refusing to establish a judicial ditch, ¹Reported in 166 N. W. 405.

"for the reason that the proposed ditch will not be of public utility or benefit, and that the estimated benefits to be derived from the construction of said work will not exceed the total cost thereof."

The court had no authority to order the construction of the ditch, unless it found that the ditch would be of public benefit, and also that the special benefits to be derived from it would exceed the total cost of the project. The petitioners contend that the evidence established the affirmative of both these propositions so conclusively that the court could not reasonably hold that they were not established. We are unable to reach this conclusion.

The viewers reported their estimate of the benefits at \$103,173, and the engineer reported his estimate of the cost at \$73,324. The petitioners base their contention largely upon these reports; but these reports did not conclusively establish the facts reported, and the court was called upon to determine, from all the evidence presented, whether the ditch would be of public benefit, and, if so, whether the amount of special benefits would exceed the total cost. In addition to these reports a large amount of other evidence was presented, some of which tended to cast doubt upon whether the ditch would accomplish the purpose intended, and some of which tended to show that the viewers had largely overestimated the amount of special benefits which would be derived from the ditch. The testimony is too voluminous to summarize and we shall merely mention a few practically undisputed facts which the court necessarily took into consideration in reaching its conclusion.

The ditch is in a comparatively wild and unimproved locality and there are very few settlers in that vicinity. It appears that swamp lands adjoining the ditch are assessed for amounts which exceed the present value of such lands; that swamp lands, the nearest boundary of which is half a mile from the ditch, are assessed for amounts not much below the present value of such lands; that considerable quantities of land which are high and dry are assessed for amounts nearly as large as those assessed against the neighboring swamp lands, and that a considerable part of the entire assessment is for benefits which are not special to the land assessed but general to the entire community. The viewers assign as the basis for considerably more than one-third

of their estimate of benefits that the locality would become more healthful; that the swamps would cease to be a breeding place for mosquitoes; that the climatic conditions would be improved and the lands be less subject to frosts, and that the building and repair of roads would be facilitated and the lands would become more accessible and marketable. The lands assessed would perhaps derive special benefits, in the form of enhanced values, from such results; but it is obvious that benefits of this character are largely speculative and would be shared by the community generally, and the evidence would hardly justify the court in finding that the special benefits of this nature to these particular lands, as distinguished from the general benefit to the community, would amount to the large sum estimated by the viewers.

We are of opinion that upon the record taken as a whole the court reached the correct conclusion and the order is affirmed.

STATE v. NORTHERN PACIFIC RAILWAY COMPANY.1

February 15, 1918.

No. 20,567.

Criminal law — unlicensed drinking place — conviction not sustained by evidence.

The evidence is held not to sustain a conviction for keeping an unlicensed drinking place in violation of G. S. 1913, § 3169.

Defendant appealed to the district court for Clay county from a judgment of a justice of the peace. The appeal was heard before Nye, J., who affirmed the judgment of the justice. From the judgment entered pursuant to the order for judgment, defendant appealed. Reversed.

C. W. Bunn and D. R. Frost, for appellant.

Lyndon A. Smith, Attorney General, James E. Markham, Assistant Attorney General, and C. G. Dosland, County Attorney, for respondent.

1Reported in 166 N. W. 351.

DIBELL, C.

Appeal from a judgment of the district court of Clay county affirming a judgment of a justice of the peace finding the defendant guilty of keeping an unlicensed drinking place, heard in the district court on appeal on questions of law alone.

One Cederberg, an employee of the defendant railway company, was in charge of the office in its freight depot at Moorhead. It is through his acts that it is sought to charge the defendant. At the time of the filing of the complaint a search warrant was issued by the justice pursuant to G. S. 1913, § 3172, which authorizes it when the charge is the keeping of an unlicensed drinking place. Considerable quantities of intoxicating liquors were found. There was evidence, disputed on behalf of the defendant, tending to show that liquors came to the defendant's depot consigned to fictitious persons; that one Smith, who operated a taxi line in Fargo, came to the depot and got liquor for those who sent him for it; that customarily, though not always, he took the particular brand which was desired regardless of who was the consignee; that sometimes Cederberg directed him what to take and sometimes he did not; that he paid Cederberg the price, it apparently being consigned c. o. d., and charged for the delivery; that sometimes he signed receipts and sometimes he did not; that he did not have orders from the consignees; that he did not assume to represent them, and that in taking the liquor there was a substantial disregard by him and Cederberg of the nominal consignees. We are not more definitely informed of the arrangement under which the liquors came to Moorhead.

The complaint charges the commission of the offense of keeping "an unlicensed drinking place." G. S. 1913, § 3169. Public drinking places are defined as "saloons, public bars, and other places of business or public resort where liquor is commonly sold in quantities less than five gallons, or to be drunk on the premises." G. S. 1913, § 3162. This evidently contemplates licensed drinking places. Other sections in the immediate connection regulate the conduct of drinking places, their closing at stated times, the posting of a license, etc. The term "unlicensed drinking place" is not defined.

Sales in quantities less than five gallons, or in any quantity to be drunk upon the premises, without a license, are forbidden. G. S. 1913

§ 3109, et seq. No so-called sale is shown to have been of a less quantity than five gallons, nor to be drunk on the premises. The term "unlicensed drinking place," though not defined, is evidently used in contrast with a licensed drinking place which is regulated in the immediately preceding sections. It is settled that under our intoxicating liquor legislation a license is only required of retailers, and that the quantity of five gallons is the determining quantity, and that those who sell in that or greater quantities are not required to procure a license. They may, unless a particular statute forbids, without offense be unlicensed sellers. This has been the practical construction of our statutes from the beginning. We need only cite the cases. State v. Sullivan, 117 Minn. 329, 135 N. W. 748; State v. Minnesota Club, 106 Minn. 515, 119 N. W. 494, 20 L.R.A.(N.S.) 1101; State v. Bates, 96 Minn. 110, 104 N. W. 709, 113 Am. St. 612; State v. Orth, 38 Minn. 150, 36 N. W. 103; State v. Schroeder, 43 Minn. 231, 45 N. W. 149; State v. Benz, 41 Minn. 30, 42 N. W. 547. While the legislative aim has been to regulate the sale to actual consumers, the means adopted as the most effectual has been the prohibition of sales in less quantities than five gallons without a license. State v. Benz, 41 Minn. 30, 42 N. W. 547; State v. Schroeder, 43 Minn. 231, 45 N. W. 149.

Within the meaning of the statute an unlicensed drinking place was not conducted in the defendant's depot.

In one of the briefs reference is made to the county option law. Laws 1915, p. 24, c. 23. It may be that the acts of the defendant offended section 13 of this act, which in comprehensive terms prohibits dealing in intoxicating liquor in any quantity in dry territory. The question is not of practical importance here. The state does not ask to sustain the conviction as for a violation of the local option act. The prosecution is not under that act; besides the violation of the act carries a punishment of both fine and imprisonment which puts the offense which the act defines beyond the jurisdiction of the justice of the peace.

We have assumed that the act of Cederberg, if in itself criminal, was the criminal act of the defendant though it was not connected with it except by relation. The question is not argued.

Judgment reversed.

THOMAS J. SHARKEY v. CHARLES BATCHER.1

February 15, 1918.

No. 20,668.

Injunction.

Permanent injunction held justified by the evidence.

Action in the district court for Todd county to reform a written agreement between the parties, and to restrain defendant from maintaining an obstruction to the entrance of plaintiff's building from the public alley. The case was tried before Roeser, J., who made findings reforming the agreement, granted an injunction against defendant obstructing the entrance to the public alley and ordered judgment against plaintiff for \$35, the cost of putting the wall in condition, and against the defendant for costs and disbursements. From the judgment granting the injunction, defendant appealed. Affirmed.

L. M. Davis and W. F. Donohue, for appellant. Arthur B. Church, for respondent.

DIBELL, C.

Action for an injunction. Judgment for the plaintiff. The defendant appeals.

The plaintiff and the defendant owned adjoining properties, in Staples, facing on First avenue at the south, the plaintiff's property being easterly of that of the defendant. Both were improved. The plaintiff was about to tear down and rebuild. He made an arrangement with the defendant whereby he was to build a wall, under the easterly side of the defendant's building, sufficient to support it. In consideration of his doing this and of his permitting sewer and water pipes to pass through his lot to the defendant's property, the defendant agreed to give him the use of the ground in the rear of his building as a means of entrance and exit. The court finds on sufficient evidence that the wall was constructed substantially according to contract, though imperfect in some details, for which a

¹Reported in 166 N. W. 350.

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sufficient allowance was made. The written agreement was informal. The property affected was not described by legal subdivision nor was that of which the plaintiff was to have the use specifically located. There was no difficulty in supplying the correct description. The evident purpose was to give the plaintiff access to and from an alley to the west of the defendant's property. It was the opening into the alley at his property line which the defendant closed, and the closing is what the court enjoined. The court reformed the contract so as to express the real intent of the parties. Perhaps all of the reformation made was not necessary but there was no error harmful to the defendant. The merits are with the plaintiff. The defendant is treated fairly by the judgment and the parties are getting and giving in accordance with their agreement.

Judgment affirmed.

CHARLES F. KNAPP v. NORTHERN PACIFIC RAILWAY COMPANY AND ANOTHER.¹

February 15, 1918.

No. 20,701.

Railway - accident at street crossing - contributory negligence.

1. The evidence examined and held to show that plaintiff's intestate, killed in a collision with defendant's train at a street crossing, was guilty of contributory negligence.

Same — evidence of wilful negligence.

2. The evidence is insufficient to support a recovery on the theory of wanton injury, or wilful or wanton negligence.

Trial - refusal to give request to jury.

3. There can be no error in refusing to give a request where the evidence is insufficient to support a finding upon the issue to which the request relates.

Railway — contributory negligence — evidence of custom in another village — offer of evidence.

4. The custom of flagging trains in a neighboring village to the one ¹Reported in 166 N. W. 409.

wherein the collision occurred, can have no bearing upon decedent's contributory negligence, where no offer was made to show that it was ever the practice to fiag trains at the latter place, or that he was not fully acquainted with the practice there obtaining.

Action in the district court for Sherburne county by the administrator of the estate of Frank B. Knapp, deceased, to recover \$7,500 for the death of his intestate. In their answer defendants denied wilful or careless operation of the locomotive or train. The case was tried before Giddings, J., who at the close of the testimony denied motions for a verdict in favor of each defendant, and a jury which returned a verdict for \$2,000. Defendants' motion for judgment notwithstanding the verdict, on the ground that it conclusively appeared that decedent was guilty of contributory neglience, was granted. From the judgment in favor of defendants, plaintiff appealed. Affirmed.

Hall & Tautges, for appellant.

C. W. Bunn and B. F. Lyons, for respondents.

HOLT, J.

Plaintiff's intestate, Frank B. Knapp, was killed when the automobile he was driving was struck by the west bound limited passenger train of defendant where its tracks are intersected, at about right angles, by one of the main traveled streets in the little village of Clear Lake, this state. In this action to recover damages sustained by his widow and next of kin, the court ordered judgment entered for defendant notwithstanding the verdict rendered for plaintiff, who appeals.

The learned trial court held that under the undisputed facts Mr. Knapp was guilty of contributory negligence, as a matter of law. The facts and circumstances of the accident are as follows: The collision occurred at one o'clock in the afternoon of October 13, 1915, a bright, pleasant day. The situation was such that, while Knapp was driving the last 100 feet before striking the first rail of the west bound track, he continuously had an unobstructed view to the east, from which direction this train was coming, for more than 1,200 feet. Immediately south of the two main tracks was the usual railroad crossing sign post, and north of the west bound track, and less than 25 feet from the point of collision on a post, carrying similar signs in large letters, was an automatic gong or bell,

which was ringing. The station whistle was sounded and so was a crossing whistle when some 1,200 to 1,400 feet east of this crossing. locomotive bell was also ringing. Deceased was driving northerly towards the crossing in a one-seated Ford automobile, the rear seat having been removed and a tool box put in its place. There was a top over the front seat which was up, but there were no side curtains. The wind shield was up. To the tool box was tied the butt end of a 20-foot telephone pole, the small end of which dragged on the ground. The speed of the automobile was variously estimated at from 6 to 15 miles an hour. There was a slight rise in the street as it approached the crossing. The train was 8 or 10 minutes late, and was running at its usual speed, variously stated to be from 45 to 55 miles per hour. The locomotive struck the rear wheel of the automobile, throwing out and instantly killing Mr. Knapp. He was 62 years old, active and in good health. There is no evidence of any impairment of sight or hearing. He lived at Big Lake, a little village 15 miles east of Clear Lake, but had for a long time been engaged in keeping in repair the rural telephone lines centering in these two and adjacent villages, so that he was perfectly familiar with the situation at Clear Lake, and the train service over defendant's railway.

It has long been settled law that one about to traverse a railroad crossing must use his senses to discover and avoid the danger from passing locomotives or cars. If failure or neglect to observe this safeguard contributes to a collision with a train it defeats a recovery for the injury sustained. Had Mr. Knapp not been wholly oblivious to his surroundings he, no doubt, would have heard the station and crossing whistles, and it is inconceivable that he could have come up to the crossing without hearing the ringing of the automatic gong, only a few feet distant, if he had given but the slightest attention to the possibility of danger from trains. And in respect to the use of his eyes, it is perfectly clear that a single glance toward the east, at any point while traversing the last 100 feet of his course, would have revealed the approach of the train in ample time to avoid injury. He could have stopped the automobile under the conditions existing within a distance of 3 or 4 feet. There were no passing vehicles or moving trains or cars, other than the train in question, to distract him. It is true, there was testimony that this automobile was rather noisy and that the noise was somewhat increased by the pole dragging behind. If that interfered with his sense of hearing, the more need to use the eves. Schneider v. Northern Pacific Rv. Co. 81 Minn. 383, 84 N. W. 124. The evidence is conclusive that he either did not look when he had full opportunity so to do, or did it so negligently that he failed to note the swiftly approaching train then within view. There is no evidence that the dragging of the pole behind, as was done this time, was either unusual or distracting to the deceased. Nor can we conceive that the failure of a person who stood near the point of collision to warn Knapp can be considered a distracting circumstance, as claimed by appellant. It is further suggested that the outlook for trains coming from the west was somewhat obstructed and that Knapp's attention might have been engaged upon discovering a threatened danger from that direction. But there is no evidence tending to show that he was thus engaged, and even were it so, it would not excuse bestowing a single glance towards the east. We are forced to the conclusion that the deceased attempted this crossing without looking or listening for danger, and that had he done either, however perfunctorily, the deplorable accident would have been averted. The presumption that the deceased used due care to avoid injury is destroyed when it appears "from the undisputed evidence that if deceased had looked and listened before driving upon the crossing he must have seen and heard the train approaching." Carlson v. Chicago & N. W. Rv. Co. 96 Minn. 504, 105 N. W. 555, 4 L.R.A. (N.S.) 349, 113 Am. St. 655.

But it is said the evidence made a case for recovery for a wanton injury, or, so-called, wilful or wanton negligence. This is predicated on the fact that the fireman saw Mr. Knapp when the locomotive was several hundred feet east of the crossing, and ought then to have known that Knapp was unaware of the approach of the train, and should have caused the engineer to give the alarm whistle in time to prevent the collision. It is confidently asserted that the jury could find the facts for the application of the humane legal principle that where one discovers a person in a place of peril, no matter what fault or wrong of his brought him there, ordinary care must be used to avoid injury to him. The difficulty with the facts here is that Mr. Knapp was not in any peril, apparent or real, up to the time he came within a very few feet of the west bound main track. The fireman knew that several blasts of the whistle had been given within

a half minute and that the bell on the locomotive was ringing. He saw that the speed of the automobile was such that the vehicle could be readily stopped, and that the driver by a mere side glance could see the approaching train. He could not well see Knapp's face, he sitting on the left side of the car, the side farthest away from the fireman. No one, under the conditions appearing to the fireman, could appreciate that Mr. Knapp then was or soon might be in peril. One of plaintiff's witnesses, who stood about 35 feet north and east of the point of collision, looking directly at the automobile as it approached, testified that he made no move to warn Knapp because of the expectation that he would stop in time. Other witnesses who observed deceased harbored the same thought. Such being the situation, a jury should not be permitted to say that the fireman discovered Knapp in a position of peril in time to cause a warning to be given that would have saved him.

The position of deceased appeared to the fireman quite different from that of a person walking on a track with his back toward an oncoming train, such as was the case in Mellon v. Great Northern Ry. Co. 116 Minn. 449, 134 N. W. 116, Ann. Cas. 1913B, 843; Havel v. Minneapolis & St. Louis R. Co. 120 Minn. 195, 139 N. W. 137; and Gill v. Minneapolis, St. P. R. & D. Ele. T. Co. 129 Minn. 142, 151 N. W. 896; or where a person was caught in a frog, as in Palon v. Great Northern Ry. Co. 129 Minn. 101, 151 N. W. 894; or where a small child is discovered on the track, as in Scheffler v. Minneapolis & St. Louis Ry. Co. 32 Minn. 518, 21 N. W. 711.

We think the facts and inferences of the instant case are as inadequate to show wanton injury or wilful or wanton negligence as they were held to be in Judson v. Great Northern Ry. Co. 63 Minn. 248, 65 N. W. 447; Arine v. Minneapolis & St. Louis Railway Co. 76 Minn. 201, 78 N. W. 1108, 1119; Olson v. Northern Pacific Ry. Co. 84 Minn. 258, 87 N. W. 843. No jury could, under the evidence in this case, be permitted to say that this fireman exhibited a reckless disregard for the safety of Knapp by failing, after discovering his peril, to exercise ordinary care to prevent the impending injury. Alger, Smith & Co. v. Duluth-Superior Traction Co. 93 Minn. 314, 101 N. W. 298. When Knapp's peril appeared to the men in charge of the train, the accident could not be averted.

Holding as we do, that the evidence will not support a finding of wanton or wilful negligence, the refusal to give an instruction containing the law applicable to such issue was not error.

The court did not err when excluding evidence of the custom and practice to flag trains at Big Lake, where Knapp lived, as bearing upon his alleged contributory negligence. The fact that defendant's railway runs through both of these villages under about similar conditions, and that the station agent at Big Lake customarily flags trains, does not give a person the right to expect that it will be done at Clear Lake, especially where, as here, there is no offer to prove that it was ever the practice to flag trains at Clear Lake or that the deceased was not fully conversant with the practice there obtaining. The materiality or relevancy of the offered testimony is not made to appear.

In view of the conclusions already expressed there is no need of considering the claim of respondent that the trial court properly ordered judgment non obstante because no negligence was proven against defendant.

We think the judgment right, and it is affirmed.

CHARLES W. SMITH v. GREAT NORTHERN RAILWAY COMPANY.1

February 15, 1918.

No. 20,704.

Master and servant - promise to furnish guard.

1. The evidence sustains a finding of the jury that the plaintiff remained in the employment of the defendant, appreciating the risk of working about an unguarded lubricating glass, in reliance upon a promise that it should be guarded, and under such circumstances as to transfer the risk.

Compromise and settlement — rescission for misrepresentation of material fact.

2. A contract of settlement of a cause of action procured by a misrep-Reported in 166 N. W. 350. resentation of a material fact, though innocently made, may be rescinded by the one relying upon it, following Jacobson v. Chicago, M. & St. P. Ry. Co. 132 Minn. 181.

Action in the district court for Yellow Medicine county to recover \$15,000 for injuries received while in the employ of defendant. The answer alleged that the risks of the work in which plaintiff was engaged were fully appreciated and assumed by him, and set up his contributory negligence and a settlement with defendant. The reply set up the facts concerning plaintiff's settlement with defendant. The case was tried before Daly, J., who at the close of the testimony denied defendant's motion for a directed verdict, and a jury which returned a verdict for \$5,000, less \$330 and interest from September 13, 1916. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

M. L. Countryman and A. L. Janes, for appellant.

T. J. Mangan, for respondent.

DIBELL, C.

Action for personal injuries. There was a verdict for the plaintiff. The defendant appeals from the order denying its alternative motion for judgment or a new trial.

1. The plaintiff was employed in the defendant's roundhouse at Breckenridge. He was injured by the breaking or explosion of a lubricating glass. The evidence sustains a finding that the defendant was negligent in not having it guarded. The plaintiff appreciated the danger of working about it and assumed the risk unless such risk was transferred by a complaint and promise.

The injury occurred on May 31, 1916. Some two weeks before, upon the breaking of a glass, the plaintiff complained to his superior that someone was likely to get hurt. Some effort was then made to get a guard but it was resultless. Other conversations were subsequently had, and the plaintiff's superior interested himself in the procuring of proper guards. At the final conversation, the precise time of which is not shown, the plaintiff testifies that this occurred:

"I told him somebody was going to get hurt and that I was afraid of those glasses, they was so close to me, and that if they wasn't guarded I was going to quit work at the end of the month. And he says, 'Well, they will be guarded,' he says, 'you go ahead and at the end of the month,' he says, 'they will be guarded; I will see to it.'"

His claim is that he continued at work in reliance upon the promise that the glass would be guarded. The contention of the defendant is that the plaintiff contemplated remaining until the end of the month, regardless of the condition of the lubricator, and that in no proper sense could it be found that he remained at work relying on a promise to guard. We think the question was one of fact for the jury. Viewing the evidence favorably to the plaintiff, as we must on this appeal, the defendant was putting forth active effort for some little while to get guards, and the plaintiff was pressing his complaints. The plaintiff did not undertake to remain to the end of the month. He did indicate that that was the limit of his stay unless a guard was provided. His intention of staying through the month is not at all conclusively evidenced. Indeed his statement is that he continued at work in reliance upon the promise. Nor does the language used by his superior necessarily mean that the guard was not to be furnished until the end of the month. contrary, the defendant was making a good-faith effort to get guards at once, and the assurance was that the "end of the month" was the limit of time of the continuance of the unguarded condition, and the request to the plaintiff was that he "go ahead" upon this assurance. It was for the jury to find whether the continuance of the plaintiff in his work was in reliance upon the promise. The general principles of law applicable to cases of promises to repair or remedy are well understood. Dunnell, Minn. Dig. and 1916 Supp. § 5983. The evidence was conflicting, the question was submitted to the jury in an accurate charge, and the finding of the jury is sustained.

2. The plaintiff settled with the defendant for his injury. He claims that the settlement was induced by the misrepresentation of a material fact.

The injury was to the plaintiff's eye. The settlement was substantially on the basis of compensation for lost time with two weeks added. The plaintiff's claim is that the company's physician told him in effect that his eye was substantially all right and at the end of two weeks would clear up; that this statement was repeated to him with some positive-

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ness by the claim agent at the time of the settlement; that the statement was untrue, and that he relied upon it in making the settlement. To avoid the settlement it is not necessary to prove that the physician or claim agent entertained a wrongful intent to deceive or defraud. It may be conceded that the evidence would not sustain a finding to such effect either as to the physician or claim agent. It is enough that a misrepresentation of a material fact was made, upon which the plaintiff relied, and by which he was induced to make a settlement to his injury. If so made, though innocently, and so relied upon, the defendant must submit to a rescission of the contract of settlement. The question was recently considered by the Chief Justice in Jacobson v. Chicago, M. & St. P. Ry. Co. 132 Minn. 181, 156 N. W. 251, L.R.A. 1916D, 144, and requires no further discussion now. That case is controlling upon the settlement feature of this case.

Order affirmed.

MABEL BURBRIDGE v. ELLA M. WARREN AND OTHERS.1

February 15, 1918.

No. 20,708.

Tax sale — affidavit of publication defective — expiration of time for redemption.

Plaintiff claims title to land under a sale for taxes held under Laws 1913. c. 543. It is held:

- (1) The notices of expiration of redemption were not served as required by law, for the reason that the affidavit of the publisher of the newspaper in which service by publication was attempted to be had stated that it was "generally circulated in Ramsey county and elsewhere." This was not proof of a legal publication. Lovine v. Goodridge-Call Lumber Co. 130 Minn. 202, followed.
- (2) The time for redemption from a tax sale made under Laws 1913,c. 543, does not expire until the service of a notice and the expiration of60 days thereafter.

1Reported in 166 N. W. 408.

Action in the district court for Ramsey county to determine adverse claims to certain real estate. The separate answer of defendant Warren alleged that she was the owner in fee simple of the land. The case was tried before Orr, J., who made findings and ordered judgment in favor of plaintiff. From an order denying her motion for a new trial, defendant Warren appealed. Reversed.

James E. Trask, for appellant.

Russell L. Moore, for respondent.

Bunn, J.

Action to determine adverse claims to 26 lots in St. Paul. The decision was for plaintiff, and defendant appeals from an order denying a new trial.

It is conceded that defendant is the owner of the lots, unless her title has been divested by a sale for taxes held pursuant to Laws 1913, p. 781, c. 543. The facts as found by the trial court are as follows:

The taxes on the lots for each and all of the years 1898 to 1912 inclusive became and were delinquent. Under the provisions of Laws 1913, p. 781, c. 543, the auditor of Ramsey county on May 12, 1914, sold the lots to plaintiff, and issued to her a certificate of sale for each lot. Plaintiff procured the issuance of notices of expiration of redemption from the sale to her, which were served by publication. There was no redemption and the certificate being presented to the Governor, he issued his deed to plaintiff in the form prescribed by Laws 1913, p. 781, c. 543. This deed was duly recorded, and plaintiff entered into possession of the premises. The conclusion of law was that plaintiff was the owner of the lots, and that defendant had no right, title, estate, lien or interest therein.

The findings of fact are not challenged. The conclusion of law is. It can only be sustained by holding either that the time for redemption was cut off by the notices and the expiration of the 60 days, or that under Laws 1913, p. 781, c. 543, there was no right of redemption after the sale.

1. The notices of expiration of the time for redemption were attempted to be served by publication. In our opinion defendant's point that there was no proof of the legal character of the newspaper in which

the publications were made is sound. The affidavit of the publisher stated that the newspaper is published in the city of St. Paul, has been delivered each week to more than 240 paying subscribers, and that it was "generally circulated in Ramsey county and elsewhere." The law (G. S. 1913, § 9413), requires that the newspaper must be circulated "in and near" its place of publication to the extent of at least 240 copies. The affidavit did not prove a legal publication. Lovine v. Goodridge-Call Lumber Co. 130 Minn. 202, 153 N. W. 517. It is unnecessary to consider any of the other points made against the notices or their attempted service.

2. The decision of the trial court was that sales under Laws 1913, p. 781, c. 543, were not subject to redemption, but were absolute. In an able opinion the learned trial judge distinguishes the case of Cole v. Lamm, 81 Minn. 463, 84 N. W. 329, and holds that it was not necessary to give notice of the expiration of redemption. Counsel for defendant claims that it was necessary to give notice of expiration of redemption, that the case is not to be distinguished from Cole v. Lamm. He also argues vigorously that chapter 543 is unconstitutional for various reasons.

Laws 1913, p. 781, c. 543, is entitled "An Act to enforce payment of taxes which have become and are delinquent for each and all of the fifteen years next prior to the year 1914." Section 1 provides that at the time of making the list of delinquent taxes upon real estate in the year 1914, as required by Laws 1905, § 905, the auditor of each county shall make out and append to such delinquent list a list of all real estate in the county upon which taxes "have become and are delinquent for each and all of the fifteen years next prior to the year 1914." It is further provided that the list shall contain a description of each parcel, the name of the person to whom assessed, the amount of taxes and interest due, and the assessed value for the year 1912.

Section 2 provides that the same proceedings shall be had, with reference to judgment and sale, as are required by the general tax law, except that separate tax judgment and copy tax judgment books shall be provided.

Section 3 provides that any person having an interest in any tract included in the list may redeem the same at any time before the sale.

Section 4 provides that the sale shall be made by the county auditor

"immediately following the delinquent sale in May," and may continue from day to day to June 1, 1914. The officer conducting the sale is, required to give the purchaser a certificate of sale in a form prescribed by the attorney general.

Section 5 provides that any person receiving the certificate described in the preceding section shall be entitled to a deed from the state, and that upon presentation of the certificate to the Governor he shall be authorized to execute a deed in the name of the state to the person entitled thereto, conveying the lands therein described, and "every such deed shall vest the grantee with complete title to such lands."

We find some difficulty in determining what the legislature meant when it used the words "real estate upon which the taxes have become and are delinquent for each and all of the fifteen years next prior to the year 1914." The taxes for 1913 would not be "delinquent" until January, 1915. Hence it may be assumed that it was intended to include real estate upon which the taxes were delinquent for "each and all" of the years 1898 to 1912 inclusive. How can we have lands in this situation? The act does not by its terms expressly include or mention lands which have been sold to the state for nonpayment of taxes, as did the act of 1899, involved in Cole v. Lamm, supra. But it must necessarily be that it was the intention to include such lands, and that at some period prior to the enactment of chapter 2, § 3, p. 2, Laws 1902, these lands were sold to the state at one or two tax sales, in default of an actual purchaser. This is so because it is not perceived how the taxes upon the lands for 1898, for instance, can be delinquent in 1914, unless the lands were included in the delinquent list for 1900, sold to the state at the sale in May of that year and still held by the state. If so sold to an actual purchaser, the taxes would no longer be delinquent. Nor would they if paid by the landowner or by an assignee of the state, or if the lands had been sold at a forfeited tax sale. But they would be "delinquent" if bid in by the state and not redeemed or the state's interest assigned. Jenswold v. Minnesota Canal Co. 93 Minn. 382, 101 N. W. 603. This is applying the presumption that the public officials have performed the duties imposed upon them by statute. same presumption again, since 1902 these lands have not been included in the delinquent list or in the tax judgment, and have not been sold

for taxes. G. S. 1913, § 2094; Forbes v. Stream, 117 Minn. 484, 136 N. W. 304. Taxes have been assessed for each of these years, and have become delinquent, but there has been no sale, and hence no right of redemption from a sale.

What is the situation as to a right of redemption from the sale of 1900, or the sale of 1901, if there was a sale that year? As held in Cole v. Lamm, supra, the sale for 1900 was controlled as to the redemption period provided for at the time such sale was made, and the period of redemption existing at such time became an assured right between the landowner and the state, which could not be taken from him. What was the redemption period provided for by law in 1900? Laws 1893, p. 167, c. 58, incorporated into the 1894 Statutes as sections 1657 to 1661. was in force in the year 1900, and until the enactment of Laws 1902, p. 1, c. 2. Under this law the time for redemption of land bid in by the state at a tax sale did not expire as to the state until 60 days after giving notice of expiration of the time. The 1902 law seems to have repealed this requirement, but, by its terms, it did not affect any rights accrued under prior laws. Laws 1905, p. 406, c. 270, § 1, again made it necessary to give notice of expiration as to tax sales made to the state. G. S. 1913, § 2149. It follows that by the law in force at the time the tax sale of 1900 was made, which sale we must presume, for reasons before stated, was made to the state, the time for redemption did not expire until 60 days after notice was given. This applies also to the sale of 1901, if the property was sold that year for delinquent taxes. The landowner, as said in Cole v. Lamm, supra, "might thereafter go his way, relying upon the assurance of the law that he would not be deprived of the title to his property until notice had been given and the additional time to redeem had expired" thereunder.

In our opinion, the case is not to be distinguished from Cole v. Lamm, supra. The legislature could not deprive the landowner of his vested right to be notified of the expiration of the redemption period, and to 60 days thereafter in which to redeem. The suggestion that the right given to the landowner by section 3 of the act to "redeem" at any time before the sale, is a substitute for the right to redeem from the sale, is answered by the decision in Cole v. Lamm. This was no new right.

Our conclusion is that it was necessary to give notice of the expiration

of the time for redemption from a sale made under Laws 1913, p. 781, c. 543, and that redemption might be made within 60 days thereafter.

We do not decide as to the constitutionality of the law. It is rather a curious piece of legislation.

Order reversed and new trial granted.

ANN BARRETT v. C. E. VAN DUZEE.1

February 15, 1918.

No. 20,716.

Theatre and show - unlighted stairway - question for jury.

1. In this action to recover damages for injuries received in a fall on a stairway in a theatre, it was alleged that the stairway was negligently constructed and left unlighted. There was no evidence that the fall was the result of any defect in the stairway. Whether it was left unlighted and thereby caused plaintiff to fall was made an issue for the jury.

Evidence - subpoens to witness.

2. Ordinarily it is not material for the jury to know whether plaintiff or defendant subpoenaed a witness who has given important testimony on a vital issue in the case.

Witness - redirect examination.

3. As a rule it is not permissible by redirect examination of a witness, to bring out the fact that he has repeated the story told on the witness stand for the purpose of counteracting the admission of a prior contradictory statement, made in his cross-examination. Plaintiff did not bring the witness within the exception pointed out in State v. La Bar, 131 Minn. 432.

Witness — credibility.

4. How long the witness' husband had been engaged in the real estate business could be of no possible aid in determining any issue involved, and could not bear upon the credibility of the witness.

Question for jury.

5. The evidence warranted the submission of plaintiff's lapse of memory.

¹Reported in 166 N. W. 407.

Trial - statement by court. .

6. The court made no misstatement of a fact in the case, nor prejudiced plaintiff by the observation that a person may, under some circumstances, go safely down a dark stairway, for it conveyed the thought that plaintiff was not to be held guilty of negligence as a matter of law by entering a dark place.

Action in the district court for Hennepin county to recover \$10,400 for injuries received in falling down a stairway on defendant's premises. The answer alleged plaintiff's injuries were caused by her want of care. The case was tried before Fish, J., and a jury which returned a verdict for defendant. From an order denying her motion for a new trial, plaintiff appealed. Affirmed.

James Manahan and Thomas V. Sullivan, for appellant. Hall, Tautges & Sapiro, for respondent.

HOLT, J.

Defendant conducted a moving picture theatre in Minneapolis. On either end of the foyer a door opened into a stairway leading down to the basement floor where were toilet facilities. In the afternoon of February 13, 1915, plaintiff, a lady upwards of 70 years of age, went with her relative Mrs. Carlson, to attend a performance at this theatre. She desired to go to the toilet rooms, and Mrs. Carlson directed her to the door. She fell and was found at the bottom of the stairway with both arms fractured. This action was brought to recover for the injury suffered, on the theory that it was caused by defendant's negligence in failing to have a properly constructed stairway and in failing to have it lighted. A verdict was rendered for defendant and plaintiff appeals from the order denying a new trial.

There is not a particle of evidence tending to establish that plaintiff's fall resulted from any defect in the construction of the stairway or its approach. Hence the sole ground of recovery is the alleged failure to properly light the stairway. The evidence clearly made that issue one for the jury; so that unless prejudicial error is pointed out in the rulings or in the instructions of the court, or in permitting the jury to pass upon the defense of contributory negligence, this court cannot set aside the verdict, approved as it is by the trial court.

Bloomberg, defendant's manager of the theatre at the time of the accident, was called as witness by plaintiff, and testified that the lights in the stairway were not turned on when he found plaintiff at the bottom thereof. His cross-examination developed that, immediately after the occurrence, he told defendant and his attorney to the contrary. On redirect plaintiff sought to show what party to the action had subpoenaed the witness. Such a legitimate preparation for the trial as subpoenaing a witness, who on the stand gives testimony upon a most vital fact in dispute, ought not to weigh for or against a party with the jury. Time should not be consumed upon such matters, and, as the court well remarked, it was perfectly apparent from Bloomberg's testimony why plaintiff should have secured his presence at the trial. Surely, no adverse comment upon the witness' testimony can be spelled out of the court's remark.

Because the cross-examination of Bloomberg disclosed that he had made statements at variance with the story told on the witness stand, it was not permissible on redirect to show by him that he had also repeatedly told the story testified to. State v. La Bar, 131 Minn. 432, 155 N. W. 211. Plaintiff laid no foundation for bringing the testimony sought to be elicited within the exception pointed out in the case cited.

It is not apparent why, in the cross-examination of Mrs. Carlson, it was at all material that the jury should know how long her husband had been engaged in the real estate business. It would not aid in determining the credibility of her testimony.

Error is predicated upon the submission of the defense of contributory negligence to the jury, and the manner of its submission. The answer alleged that plaintiff by her own negligence and want of care caused the injuries. Defendant offered no affirmative or direct proof of such negligence or want of care. But if the evidence introduced by plaintiff in proving her case, together with other established facts, warranted the jury in arriving at the conclusion that her want of ordinary care contributed to the accident, the court was right in submitting the defense pleaded. Hocum v. Weiterick, 22 Minn. 152; Parson v. Lyman, 71 Minn. 34, 73 N. W. 634; Mellon v. Great Northern Ry. Co. 116 Minn. 449, 134 N. W. 116, Ann. Cas. 1913B, 843. The foyer was well lighted, which to a certain extent would light the upper landing and stairway

when the door thereto was opened. There was also evidence that this door stood ajar. The first step was not flush with the outer edge of the door as it swung in over the landing, but was some 7 inches from the nearest door jamb. There was a hallway or landing of about 4 feet square before the steps began. This landing was level with the floor of the fover. Plaintiff could give no account whatever of what happened after she opened the door, but claimed that she fell as soon as she got hold of the knob. She was found at the bottom of the steps, but does not know how she got there. The stairway was wide and comparatively easy, having 7-inch risers with slate steps about 12 inches wide. There was evidence that when found she blamed no one and said that she must have slipped on the stairs. We think it was for the jury to say whether plaintiff used ordinary care when she stepped out into, what she claimed to have been, a dark and, to her, strange passage, without taking more precaution than she testified to having taken to ascertain her surroundings and guard against injury. The jury could reasonably find that had she used ordinary care she would have observed the situation and escaped the fall. The court did not err in submitting the question of plaintiff's contributory negligence to the jury.

Nor are we able to see any merit in the contention that the learned trial court unduly emphasized this defense, or that he, in any manner, failed to clearly give the correct legal definition of contributory negligence. If the jury in the first instance were not directly told that age is one of the matters to be considered in passing upon a party's alleged contributory negligence, they were expressly so instructed when information was asked by them on that very point, the court saying: "You remember that the definition of negligence includes the same or similar circumstances. That covers all the circumstances in the case, the age and the physical condition of the party as well as the other circumstances in the case."

The jury, in considering plaintiff's account of the fall, evidently became puzzled because of the exceeding meager knowledge she displayed as to the manner of its occurrence. She was ever ready to stake her life on the fact that there was no light in the stairway, but accounted for her ignorance as to other details by stating: "When I opened the door I don't know, I fell and that is the last I remember of it * * I don't re-

member nothing after I opened the door * I could not tell how it happened." It is no wonder that the testimony suggested to a juror that plaintiff had been seized with a fainting spell, and the court was asked for further instructions on that point. The court said: "You have heard the plaintiff's statement of what occurred, and if it appears if you are satisfied that there was a complete lapse of memory. you will take that fact into account, if you are satisfied that that was a fact, no matter how it came about." Upon this error is assigned, and we are cited to Rogers v. Meyerson Printing Co. 103 Mo. App. 683, 78 S. W. 79; Rugland v. Tollefsen, 53 Minn. 267, 55 N. W. 123, and Hughes v. Meehan, 81 Minn. 482, 84 N. W. 331. In the first case the victim of the accident was dead and his version could not be had. presumption of due care there prevailed against conjecture. Rugland v. Tollefsen depended on the fact of agency of which there was no evidence whatever. And the last case cited involved an obvious misleading statement, in view of what had already been said in the charge. Here we think plaintiff's testimony furnished a substantial basis for the jury considering whether a state of unconsciousness preceded or caused the fall.

No just complaint can well be made on account of this concededly true observation made in the charge, viz.: "A person may, under some circumstances, go safely down a dark stairway." If anything, it informs the jury that it was not negligence as a matter of law to attempt to go down, even though the stairway was without light. It certainly is not a misstatement of the facts condemned in the decision of Larkin v. City of Minneapolis, 112 Minn. 311, 315, 127 N. W. 1129, and Anderson v. Wormser, 129 Minn. 8, 151 N. W. 423, cited by appellant.

We discover no reversible error in the record.

The order is affirmed.

STATE EX REL. LOUIS ENSTROM v. S. G. BERTILRUD.1

February 15, 1918.

No. 20,725.

County not liable for state wolf bounty.

1. Under G. S. 1913, § 5197, a county cannot be compelled to pay the wolf bounty offered by the state and payable out of state funds in the absence of a state fund out of which the county can be reimbursed, though the statute contemplates that in ordinary course and as a matter of convenience the county shall first pay.

County liable for county wolf bounty.

2. The additional wolf bounty offered by a county under G. S. 1913, § 5198, which is a primary charge upon the county, is payable irrespective of the payment of the state bounty or the condition of the state bounty fund.

Resolution of county board not repealed.

3. A resolution of a county board held not to repeal a previously passed resolution giving a county wolf bounty.

Upon the relation of Louis Enstrom the district court for Roseau county granted its alternative writ of mandamus directed to S. G. Bertilrud, county auditor of that county, commanding him to issue to relator a county auditor's warrant for a wolf bounty. Relator demurred to respondent's return. The matter was heard by Watts, J., who made findings and ordered judgment for relator. From a judgment entered pursuant to the order for judgment, respondent appealed. Modified.

- M. J. Hegland, for appellant.
- G. M. Stebbins, D. E. Tawney and S. H. Somsen, for respondent.

DIBELL, C.

Mandamus to compel the county auditor of Roseau to issue to the relator a warrant for a wolf bounty. From a judgment for the relator the auditor appeals.

¹Reported in 166 N. W. 405.

- 1. The statute provides for a wolf bounty of \$7.50 "to be paid by the state out of the revenue fund." G. S. 1913, § 5197. The method of payment is this: The auditor identifies the animal killed and issues a warrant upon the county treasurer. He then transmits to the state auditor copies of his certificate and warrant and the latter returns his warrant upon the state treasurer in favor of the county for the amount paid. G. S. 1913, § 5200. There has not been an appropriation for wolf bounties since 1913 and there is not now a fund against which the state auditor can draw. The wolf was killed in February, 1916, and the relator earned the bounty. If entitled, under the circumstances stated, to pay from the county, he should have a warrant. Counsel for the auditor concedes that the legislature might provide a wolf bounty and charge the county with its payment. His contention is that it has not done so. The entirely clear intent of the statute is to put ultimate liability upon the' state and not at all upon the county. The payment by the county in the first instance is a part of the means adopted by the state for getting the state's reward to the one who has earned it. The difficult question is whether it is intended, there being no state fund, that the county shall pay out of its own funds and await the legislative creation of a state fund. The proper construction is not free of doubt, but it is the view of the majority of the court that it is not intended that, when for lack of an appropriation the state cannot pay the bounty which it has promised, the county must pay and await the creation by the state of a fund. It is accordingly held that under the circumstances stated the relator cannot compel the county to pay the state bounty, but must await the creation of a state fund.
- 2. The county board is authorized to add to the reward offered by the state and itself pay such added amount. G. S. 1913, § 5197. By appropriate resolution the county board offered an additional reward of \$2.50. No reason occurs why this amount, which is a primary charge upon the county, should not now be paid, although the state bounty must await an appropriation.
- 3. Before the bounty was earned the county board passed a resolution reciting the lack of a state appropriation and instructing the auditor not to issue warrants until there was an assurance that funds for their payment would be provided. It is claimed by the auditor that this was

a rpeeal of the county wolf bounty. We do not take this view. It was a direction to the auditor relative to warrants for state bounties and did not affect county bounties.

The judgment is modified so that it will require the issuance of a warrant for the county bounty alone. No statutory costs will be allowed against the relator.

Judgment modified.

TWIN CITY BRIEF PRINTING COMPANY v. REVIEW PUBLISHING COMPANY AND OTHERS.1

February 15, 1918.

No. 20.726.

Partnership — firm name an asset.

1. The name of a copartnership is an essential element of the partnership enterprise, an asset thereof, and passes with a sale of the firm business and good will.

Same — effect of conveyance by each partner—transfer of firm name.

2. Where a sale of the entire business and property of a copartnership, including the good will, is a firm transaction, separate conveyances by the individual copartners have the same force and effect as a single conveyance executed in the name of the firm, and a transfer thus effected carries with it the right in the purchaser to the future use of the copartnership name.

Good will - right to use of name - injunction.

3. Defendant Review Publishing Company, a corporation doing a job printing business in St. Paul, expressly consented that a copartnership formed by its managing officer and those associated with him for the transaction of a similar printing business in the adjoining city of Minneapolis, might use the name "Review Publishing Company" in its business affairs in that city; under that authority the copartnership adopted that name and thereunder built up and established a prosperous printing business, to the knowledge of defendant and its said managing officer.

Plaintiff, Twin City Brief Printing Company, a corporation, was organized by some of those interested in the copartnership for the purpose of taking over the partnership business; in consummation of that pur-

¹Reported in 166 N. W. 413.

pose the individual copartners executed to plaintiff separate bills of sale of the partnership plant, property, assets and good will; the corporation thereafter for several years continued the business under the name stated, precisely as the copartnership theretofore had done.

Defendant thereafter established a branch department of its printing business in Minneapolis, and by unfair and deceptive methods attempted to divert to its office the business so built up and established by the copartnership and plaintiff. It is held:

- (1) That the copartnership acquired by the consent and acquiescence of defendant corporation the right to use the particular name in the firm transactions in Minneapolis; that right passed to plaintiff on the sale to it of the partnership property, effects and good will, and defendants may be restrained from unfairly and wrongfully interfering in the use therefor by plaintiff in that city, and by deceptive methods from attempting to divert to its branch office business that otherwise would go to plaintiff.
- (2) The facts stated in the opinion entitle plaintiff to the relief substantially as prayed for in the complaint, against all the defendants.

Action in the district court for Hennepin county against Review Publishing Company, Clarence R. Wilkinson, Fred L. Hayward and Emil E. Johnson, to restrain defendants from using the name of Review Publishing Company in Minneapolis, and from transacting the business of printing briefs, paper books and other general job printing under that name. The separate answers of defendants expressly denied that either defendant Wilkinson or Henry A. Flint or Edwin Irle ever conveyed or assigned to plaintiff the right to use the name of defendant corporation or that defendant corporation ever agreed that plaintiff might use that name in the conduct of its business. The defendant corporation interposed a counterclaim for \$10,000 for damages caused by plaintiff transacting business in defendants' name. The case was tried before Orr, J., who when plaintiff rested granted the motion of defendants for judgment dismissing the action as to the individual defendants, made findings and ordered judgment granting plaintiff the right to transact its business in its corporate name but not in the name of the Review Publishing Company. Plaintiff's motion for amended findings and conclusions was granted in part and denied in part, and plaintiff was enjoined from using in any manner the name of defendant corporation.

From the judgment entered pursuant to the amended order for judg ment, plaintiff appealed. Remanded with directions.

Jay W. Crane and R. T. Boardman, for appellant. William G. White, for respondents.

Brown, C. J.

Defendant Review Publishing Company was organized as a corporation under the laws of the state sometime in the year 1897, with its established place of business and headquarters in the city of St. Paul. It was so organized by defendant Wilkinson, H. A. Flint, and one Gardner, who joined their capital and labors for the purposes of the enterprise. The business of the company was and always has been job printing, with special attention to the printing of records and briefs for use in this and some of the Federal courts. The company established a prosperous and lucrative business, which at all times since its organization, and until the controversy involved in this action arose, has been carried on and conducted in the city of St. Paul. In 1907, defendant Wilkinson, the holder of a majority of the capital stock of the company and the manager of its affairs, conceived the idea of establishing a similar business in the city of Minneapolis, to be conducted independently of the St. Paul company. With that end in view he associated with him Henry A. Flint, and one Edwin Irle and together they opened up a brief printing shop in that city, later forming a copartnership, and thereafter conducted the same, with the knowledge and consent of the St. Paul company, under the name "Review Publishing Company, Minneapolis." In point of prosperity the success of the partnership was substantially equal to that of the St. Paul company. There was, so far as the record informs us, no competition between the two concerns, the efforts of each being limited to their respective locations. Other persons later became connected with the Minneapolis enterprise and sometime in 1912, the precise date is not material, those interested therein organized the plaintiff corporation for the purpose of taking over and continuing the business of the copartnership. Flint, a member of the copartnership, was one of the incorporators and after the organization of the corporation became its general manager. And though the business had at all times theretofore been conducted under the name "Review

Publishing Company," that name could not be given the corporation, for the name of an existing corporation cannot be taken by another corporation subsequently organized. The St. Paul company had therefore prior rights to the particular name, and in recognition thereof the new company adopted the name "Twin City Brief Printing Company."

To complete the transfer of the copartnership business and effects to plaintiff each copartner executed a bill of sale, and for the consideration therein stated thereby bargained, sold and conveyed to plaintiff all his interest in the firm property, described therein as follows:

"All right, title and interest held by the party of the first part in the plant, machinery, book accounts, bills receivable and good will of the Review Publishing Company of Minneapolis, located at 409 5th Street South in the City of Minneapolis, which machinery and book accounts were partially shown in the inventory attached hereto and made a part hereof, and also all of the property and assets of said Review Publishing Company of every description, kind and nature whatsoever."

The plaintiff thereafter continued the business, but under the name, "Review Publishing Company, Minneapolis," advertising as such and soliciting and receiving orders for printing under that name, precisely as the copartnership had theretofore done. Prosperity attended the efforts of the new concern, and this continued until the year 1916, when, it is claimed, substantial impairment thereof was brought about and caused by the alleged unfair and unlawful conduct of defendants, the facts with reference to which are substantially as follows:

Subsequent to the sale of the copartnership business to plaintiff, as already stated, Wilkinson continued the management and control of the St. Paul enterprise, and devoted his time and attention to its affairs. He was well aware of all the facts heretofore stated, and was a party to the transfer of the copartnership affairs to plaintiff. He knew of the prosperity of the business and also of the use by plaintiff of the name "Review Publishing Company, Minneapolis," and that under that name a favorable reputation had been established in that community. With all this knowledge and acting for the St. Paul company on August 1, 1916, he opened a branch establishment in Minneapolis, intending thereby to enter into competition with plaintiff and to divide the Minneapolis business theretofore established and in the control of plaintiff.

Plaintiff's office and work shop was located at 225 South Third street, Minneapolis, and was connected by telephone, the number being "Nicollet 799," and listed in the telephone directory to the "Review Publishing Company." The branch department of defendants was located at 513 Fourth avenue south, Minneapolis. Soon after opening this department Wilkinson, in furtherance of the interests thereof, deliberately ordered the telephone company to change the call of plaintiff's telephone, as it appeared in its directory, from plaintiff's place of business to that of defendants, and on the theory that the order was legitimate the telephone company made the change. Wilkinson also directed the name of Flint, plaintiff's manager, to be stricken from the directory, on the ground that he had no connection with the Review Publishing Company. Defendant Hayward, who for several years had been with plaintiff company, became connected with defendants' branch at Minneapolis, and clothed with credentials similar to those used by him while in plaintiff's service, and as the representative of the Review Publishing Company, solicited business for defendant, under the implied representation, at least under circumstances which justified the conclusion of those approached by him, that he represented plaintiff, and not the St. Paul Company. During all this time the public having business of this particular character was aware of but one concern having or using the particular name in Minneapolis, and that was plaintiff, and this fact also was well known to defendants and each of them. Yet they proceeded in the manner stated in utter disregard of plaintiff's rights in the premises.

Plaintiff brought this action to restrain defendants from further acts of the kind stated and other relief. The trial court ordered judgment granting certain relief to plaintiff, but, on the claim that the relief so granted was inadequate and not the full relief to which it was entitled, plaintiff appealed to this court.

If plaintiff's claim of a right to use the name, Review Publishing Company, be sustained, it is clear from the facts stated, which appear without substantial conflict in the evidence, that a case of unfair competition is presented which entitles it to appropriate and adequate relief. The evidence discloses an attempt on the part of defendants by deceptive methods to appropriate the benefits of a business built up and established by plaintiff and its predecessor, by falsely passing defendant off as the

founder and owner of the same. The law controlling the rights and liabilities in such cases is well settled in this state. Nesne v. Sundet, 93 Minn. 299, 101 N. W. 490, 106 Am. St. 439, 3 Ann. Cas. 30; Sheffield-King Milling Co. v. Sheffield Mill & Ele. Co. 105 Minn. 315, 117 N. W. 447, 127 Am. St. 574; Northwestern Knitting Co. v. Garon, 112 Minn. 321, 128 N. W. 288; Rodseth v. Northwestern Marble Works, 129 Minn. 472, 152 N. W. 885, Ann. Cas. 1917A, 257.

But it is contended by defendants that as against the St. Paul corporation plaintiff never acquired the right to use the particular name in Minneapolis, or elsewhere, and therefore that no interest its possesses in that respect has been encroached upon by defendants or either of them. We have given this feature of the case careful attention, for it goes to the foundation of plaintiff's claim to relief, and our conclusion thereon is that the facts presented clearly show a right in plaintiff to the use of the It acquired the right from the copartnership, which in turn adopted and made use thereof with the express consent of defendant, Review Publishing Company of St. Paul. While the record discloses no corporate action, by resolution of the board of directors, or otherwise, granting the right to the copartnership, the answer admits that it was granted, and the precise method by which the right was so given is of no material importance. In addition to that admission the record is conclusive that the corporation through its general manager, Wilkinson, who first put the name in use in Minneapolis, had knowledge that it was so used for many years, and without objection and without encroachment upon the business field of defendant; and further that a lucrative business had been established thereunder by the copartnership. under such circumstances defendant could not well challenge the right of the copartnership to use the name, and we have only to inquire whether the transfer of the copartnership business with the good will thereof to plaintiff, carried with it the right to continue the transaction of the business in that name. We think, and so hold, that the question should be answered in the affirmative.

It is well settled both in England and this country that the firm name of a copartnership, as distinguished from the name of an individual, is an element of the partnership enterprise, a substantial asset thereof, and passes with a sale of the partnership property and good will. Banks

v. Gibson, 34 Beav. 566; Rogers v. Taintor, 97 Mass. 291; Myers v. Kalamazoo Buggy Co. 54 Mich. 215, 19 N. W. 961, 20 N. W. 545, 52 Am. Rep. 811; Brass & Iron Works Co. v. Payne, 50 Oh. St. 115, 33 N. E. 88, 19 L. R. A. 82; Slater v. Slater, 175 N. Y. 143, 67 N. E. 224, 61 L. R. A. 796, 96 Am. St. 605; note in 96 Am. St. 610; Haugen v. Sundseth, 106 Minn. 129, 118 N. W. 666, 16 Ann. Cas 259. While there was no formal bill of sale or other conveyance signed in the firm name, the transaction was one by the firm, in its interests, and the bills of sale by the individual members thereof were sufficient as a transfer of the property as well as the partnership name. A copartnership, apart from the individual members thereof, has no separate legal entity, and the partnership is bound by the individual transactions of the members when had in the interests of the firm affairs. In re C. H. Kendrick & Co. (D. C.) 226 Fed. 978; Henry Dreyfus & Co. v. Union Nat. Bank, 164 Ill. 83, 45 N. E. 408; Berkshire Woolen Co. v. Juillard, 74 N. Y. 535, 31 Am. Rep. 488; Burdick, Partnership (3d ed.) 90. And in the case at bar, since the copartnership had the right to use the particular name, by the express consent of defendant, the sale and transfer to plaintiff of the firm business and good will carried with it the right to continue the business in that name. We do not hold that plaintiff has an exclusive right to the use of the name. But it has the right to protection from the wrongful conduct of defendants, and from acts which manifestly are unfair, and if persisted in will naturally result in the impairment if not the total destruction of plaintiff's business, so far as the profitable side thereof is concerned. That the acts of defendants were wrongful is clear. Ranft v. Reimers, 200 Ill. 386, 65 N. E. 720, 60 L. R. A. 291. We discover no basis, from the record, of excusing the personal misconduct of the individual defendants. With full knowledge of the facts they were deliberately attempting to benefit by the favorable reputation of plaintiff and its work, by expressly as well as by implication appearing before the public as representing the only Review Publishing Company in Minneapolis.

Plaintiff is therefore entitled to the injunction of the court restraining further interference by defendants with its right to use the name, Review Publishing Company, in its business at Minneapolis; and, if the defendant company shall continue to operate its department in that city,

that it be required to do so under such publicity as will prevent confusion in the public mind. To this end it should be required to advertise its presence in Minneapolis as the Review Publishing Company of St. Paul. This will answer the rule stated in the Sheffield Milling Co. case, supra.

The cause will therefore be remanded to the court below with directions to amend its conclusions of law to conform to the views herein expressed, and to award a modified judgment accordingly against all the defendants. There is no occasion for a new trial of the action.

Remanded with directions.

BUNN, J., took no part.

NORTHWESTERN MARBLE & TILE COMPANY v. OLOF SWENSON.¹

February 15, 1918.

No. 20,789.

Pleading - departure.

1. Under an allegation of quantum meruit, plaintiff may recover on proof of reasonable value or of an express contract fully performed. The admission of an express contract in the reply is not a departure.

Performance of express contract - evidence.

2. Since plaintiff alleged an express contract and alleged full performance, it can only recover on proof that it has performed the contract.

Action in the district court for Ramsey county to recover \$2,657 for work and material furnished. The facts are stated in the opinion. The case was tried before Olin B. Lewis, J., who when plaintiff rested dismissed the case. From an order granting plaintiff's motion for a new trial, defendant appealed. Reversed.

Kusffner & Marks, for appellant.

A. B. Darelius, for respondent.

1Reported in 166 N. W. 406.

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HALLAM, J.

Plaintiff, in its complaint, alleged a cause of action to recover the reasonable value of labor and material furnished to defendant, at his instance and request. Defendant, in his answer, admitted that plaintiff furnished certain labor and material to defendant, but alleged that the same were furnished under a written contract which the plaintiff failed to fully perform. Plaintiff replied, admitting that the labor and material were furnished under a written contract and alleged the contract was fully performed.

When the case came on for trial plaintiff ignored the admitted contract and offered proof of furnishing the work and material and of the reasonable value thereof. The trial court repeatedly admonished plaintiff's counsel that, since the work was done under an agreed contract, it could recover only on proof of its performance, but counsel declined to offer the contract in evidence or to prove that it had been performed. At the conclusion of plaintiff's testimony the court dismissed the case, but later granted a new trial. Defendant appeals from this order.

1. There was no difficulty with the pleadings. Under the allegations of quantum meruit in the complaint, plaintiff (1) might prove work and material furnished at the instance of defendant without express contract, and recover the reasonable value, or (2) it might prove that there was an express contract and that it had fully performed on its part, and recover the amount due. Larson v. Schmaus, 31 Minn. 410, 18 N. W. 273. While there is some confusion in the early cases in this state as to the second proposition, any doubt that ever existed is well cleared up in Meyer v. Saterbak, 128 Minn. 304, 150 N. W. 901. This is the prevailing rule. 40 Cyc. 2835. Scott v. Congdon, 106 Ind. 268, 6 N. E. 625; Atkins v. County of Barnstable, 97 Mass. 428; Concord Apartment House Co. v. O'Brien, 228 Ill. 360, 367, 81 N. E. 1038. Even the common law system of procedure indulged this liberality. 1 Chitty, Pl. (16th Am. ed.) *357-359; Gordon v. Martin, Fitzg. 302; Alcorn v. Westbrook, Wilson, 115; Felton v. Dickinson, 10 Mass. 287; Frazer v. Gregg, 20 Ill. 300. Over 100 years ago, Justice Story recognized this doctrine as "incontrovertibly settled." Bank of Columbia v. Patterson, 7 Cranch, 299, 3 L. ed. 351. The amount of recovery in such cases is the contract price. Kruta v. Lough, 131 Minn. 13, 154 N. W. 514; Theodore Wetmore & Co. v. Thurman, 121 Minn. 352, 356, 141 N. W. 481; Dermott v. Jones, 2 Wall. 1, 17 L. ed. 762; Hubbard v. Investment Co. 119 U. S. 696, 701, 7 Sup. Ct. 353, 30 L. ed. 548; Williams v. Sherman, 7 Wend. 109; Fuchs v. Standard Thermometer Co. 178 Mich. 37, 144 N. W. 484. It follows that there was no departure in the reply, for the reply was simply a particular allegation or admission of certain facts which plaintiff could have proven under the general allegation of the complaint.

2. But these rules, calculated to simplify pleading and eliminate technicality in procedures, were never intended to abrogate contract obligations. It is now, as always, the law that where parties enter into an express contract they are bound by its terms. Neither party can, as plaintiff claims, "lay it aside" and proceed as though no contract had ever been made. The contract determines the rights of the parties, and if the plaintiff either alleges or admits the existence of an express contract it must show a right of recovery consistent with its terms. This is part of its cause of action. This is true whether it relies on full performance by itself or on a breach of the other party, or on any other condition that may give it a right of recovery. Hammond v. Dunbar, 41 Mass. 172, 180. Had it not appeared in this case that there was an express contract, plaintiff's proof that it furnished work and material of a given value to defendant at his instance and request, would have made out a prima facie case, but since the existence of an express contract did appear by the allegation of the defendant and the admission of plaintiff, and since, in its pleadings, plaintiff relied on full performance, it could only recover upon showing that the contract was fully performed. Plaintiff did not offier to do so. The action was properly dismissed and it was error to grant a new trial.

Order reversed.

HOLT, J., took no part.

IN RE CONDEMNATION OF LAND.

FLORA A. HOBART v. CITY OF MINNEAPOLIS AND ANOTHER.¹

February 15, 1918.

No. 20.751.

Eminent domain — condemnation for park outside defendant city.

1. The board of park commissioners of the city of Minneapolis under the authority conferred by chapter 30, Sp. Laws 1889, may condemn for park purposes a tract of land adjoining another tract lying partly within and partly without the municipal limits, theretofore acquired by the city for the same purpose, the two tracts forming one compact whole, though the tract so sought to be taken is outside of and beyond the city limits and not contiguous to the boundary line thereof.

Same — statute — land "adjacent."

2. The land so taken and condemned will in that situation be "adjacent" to the city within the meaning of the statute.

Same — special act not affected by later statute.

3. The general statutes of the state upon the subject of eminent domain and the proceedings thereunder, subsequently enacted, *held* not a modification nor an amendment of the special act above cited, and such general statutes are inapplicable to proceedings had thereunder.

Same - presumption.

4. Proceedings before a legislative body authorized by statute to take and condemn private property for a public use, in the absence of some showing to the contrary, will be presumed by the courts to have been in compliance with the requirements of the law authorizing the same.

Flora A. Hobart appeared specially and filed objections to a resolution of the hoard of park commissioners of the city of Minneapolis designating certain land for park purposes and appointing appraisers to award damages for the taking of private property, on the ground that the board had no jurisdiction in the premises, the land being outside the city and not adjacent to the city boundaries. From the order of the board con-

1Reported in 166 N. W. 411.

firming the report and award of the appraisers, the objector appealed to the district court for Hennepin county where the matter was heard before Fish, J., who made findings and overruled the objections except as to the amount of the award, and appointed three disinterested persons to reassess the damages. The latter appraisers made an award of \$31,000, which was approved by the court. From the order confirming the award of the commissioners, Flora A. Hobart appealed. Affirmed.

C. A. Pidgeon and Andrew Fawcett, for appellant. James D. Shearer, for respondent.

Brown, C. J.

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In proceedings by the board of park commissioners of the city of Minneapolis, initiated and conducted under the provisions of chapter 30, p. 560, Sp. Laws 1889, for the condemnation of certain land for park purposes there was a final order by the park commissioners, made and entered as provided for by the statute, confirming the taking of the land and the assessment of \$28,000 as damages therefor. Appellant herein, the owner of the land, being dissatisfied with the action of the board because of certain alleged irregularities in the proceedings, and because of the alleged inadequacy of the damages awarded by the appraisers, appealed to the district court in the manner provided by the statute. Upon a hearing in that court all objections to the regularity of the proceedings were overruled and an order entered appointing three disinterested persons to reassess the damages. The appraisers so appointed after full hearing in the premises duly reported an assessment of \$31,000, an increase of \$3,000 over the amount given by the first assessment. Thereafter and in the due course of procedure the court made its final order confirming the order of the park board and the increased award of damages. That order is brought to this court for review by an appeal and also a writ of certiorari.

It is the contention of appellant that the park board has no authority or jurisdiction to take or appropriate the land in question for park purposes either under chapter 30, supra, or any other statute of the state, for the reasons: (1) That the land is wholly outside the boundary limits of the city, and not adjacent to lands within such limits which are devoted to park purposes; and (2) that the tract contains more than 40 acres

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and therefore is not within the authority conferred by the statute controlling the board in such proceedings.

The purpose in condemning the particular land was to enlarge and extend Glenwood Park as theretofore laid out and established by the park board. That park is composed of a single and compact tract of land lying partly within and partly without the boundaries of the city, and is connected with and forms a part of the general municipal parkway system of Minneapolis. The land in question is immediately contiguous and adjacent to the lands of that park, but does not border on or connect with the boundary line of the city limits.

The statute under which the proceedings were conducted, and which the park board contends confers the right to condemn the particular land, namely, chapter 30, supra, by sections 2 and 3 thereof, provides that the park board shall have the authority to devise and maintain parks and parkways "in and adjacent to the city of Minneapolis; and from time to time add thereto; to designate lands and grounds to be used and appropriated for such purposes," and to acquire title thereto by "gift, purchase or condemnation."

The authority thus granted is clear and specific. The legislature contemplated that, in the formation of the parks and parkways, situations might arise where it would be necessary to a well devised and orderly arranged park that the boundaries thereof be extended beyond the municipal limits, and to that end conferred upon the park board the power to include therein land adjacent to such limits. The authority is not to be construed in a way to destroy the purpose the legislature had in mind, nor to restrict the adjacent land to that which lies immediately contiguous to the city boundary. The necessary effect of an exercise of the authority so granted, and the addition of the outside land to an existing park is the extension of the municipal limits so as to include the added territory. The power of the legislature to grant such power to municipal corporations is clear, and the authorities sustain an exercise thereof even where the added land does not adjoin the municipal boundary. The word "adjacent" used in such statutes as descriptive of what lands may be so added to a municipality is given substantial and broad construction, and is not limited to its primary meaning as defined by the lexicographers. The City of Emporia v. Smith, 42 Kan. 433, 22 Pac. 616; Gorham v. Springfield, 21 Me. 59; Powers v. Comrs. of Wood County, 8 Oh. St. 285; Blanchard v. Bissell, 11 Oh. St. 96; Vogel v. Little Rock, 54 Ark. 335, 15 S. W. 891, 16 S. W. 291, 11 L.R.A. 778; In re Borough of Camp Hill, 142 Pa. St. 511, 21 Atl. 978; 28 Cyc. 184. It is not necessary to justify annexation in a particular case that the tract of land sought to be added to an existing park should immediately adjoin the municipal boundary. It is sufficient that the particular tract adjoins and is contiguous to another tract previously added to the city, so that the whole shall constitute one continuous and united territory. Catterlin v. City of Frankfort, 87 Ind. 45; Hurla v. Kansas City, 46 Kan. 738, 27 Pac. 143; Huff v. City of Lafayette, 108 Ind. 14, 8 N. E. 701. In the case at bar the tract in question adjoins Glenwood Park and taken together the two form a connected tract of land partly within and partly without the original boundary line of the city. We therefore hold that the park board had jurisdiction to condemn the same for the purposes stated.

The contention that the park board had no jurisdiction to condemn the land because it exceeds and contains more than 40 acres is not sustained. The point is based entirely upon the theory that the park board in proceedings for the condemnation of lands for park purposes is controlled by the general statutes relating to the same subject, and enacted subsequent to chapter 30, and which appellant claims modify the same in respect to the quantity of land that may be taken in such proceedings. Chapter 30 is a special law applicable only in the city of Minneapolis. It was the intention of the legislature in its enactment that it should stand as the authority for the condemnation of lands for public use in that city until thereafter expressly modified or repealed. Section 17 thereof provides that "no law of the state contravening the provisions of this act shall be considered as repealing, amending or modifying the same, unless such purpose be expressly set forth in such law." There has never been, so far as we are advised, any express repeal or modification of the act, and we follow and apply the rule stated in State v. Peter, 101 Minn. 462, 112 N. W. 866, and hold that the special act remains unaffected by the subsequent general statutes upon the same subject matter. The limitations as to the quantity of land to be taken in such proceedings as fixed by such general laws do not therefore apply.

2. The points made by appellant as to the regularity of the proceedings do not require special discussion. If there were any defects in the various steps taken and required by law to be taken upon the subject of the appraisement of damages, in the appointment of appraisers, or otherwise, the burden was upon appellant to point them out, and establish by proper showing that they in fact existed and were fatal to the proceeding. Subdivision 11, section 3, chapter 30, supra; Northwestern Tel. Exch. Co. v. Chicago, M. & St. P. Ry. Co. 76 Minn. 334, 79 N. W. 315; Knoblauch v. City of Minneapolis, 56 Minn. 321, 57 N. W. 928. In the absence of a showing to the contrary, or the affirmative appearance of a defect on the face of the record, the court will, under the rule of the Knoblauch case, presume that proceedings of this kind were in all respects in conformity with the requirements of the statutes authorizing them.

If it be conceded that this court in proceedings of this kind, in the absence of statute, may review the assessment of damages in the manner here attempted, a doubtful proposition, we discover no reason for interference in this case.

This covers the case and all that need be said in disposing of the point made. We discover no error and the order under review must be and is affirmed.

AMERICAN POSTER COMPANY v. H. D. CAMMACK.1

February 21, 1918.

No. 20,684.

Contract - construction of instruments part of one transaction.

Instruments executed at the same time, for the same purpose, and in the course of the same transaction, are, in the eye of the law, one instrument, and will be read and construed together.

Action in the municipal court of Minneapolis to recover \$390 balance due upon an advertising contract. The answer among other matters al-

¹Reported in 166 N. W. 501.

leged that before defendant's acceptance of plaintiff's proposal, plaintiff, for the purpose of inducing defendant to enter into the contract, represented to defendant that each of the programs would consist of from 12 to 16 pages, artistically printed and bound, and as an extra inducement that the different advertisements would be thrown upon a screen each night for the purpose of calling the attention of audiences thereto; that upon the strength of these representations defendant accepted the proposition; that the representations were wholly false and untrue, and that plaintiff failed to comply with the conditions of its agreement. The case was tried before Montgomery, J., who made findings and ordered judgment in favor of plaintiff for the amount demanded. From an order denying defendant's motion for judgment upon amended findings or for a new trial, defendant appealed. Reversed.

Joseph M. Reed and A. C. Finney, for appellant. William Howard Anderson, for respondent.

QUINN, J.

Action to recover a balance claimed to be owing upon a contract for advertising. The cause was tried in the municipal court of Minneapolis, without a jury, resulting in findings in favor of the plaintiff. From an order denying his motion for amended findings or for a new trial, defendant appealed.

The plaintiff had a contract to furnish the Miles and Unique theaters of Minneapolis with programs for the year 1912. Defendant was engaged in the piano business as the "Cammack Piano Company." Plaintiff, through its manager Michael B. Dillion, called upon the defendant for the purpose of inducing him to place an advertisement in the programs, which at first defendant declined to do, but after a somewhat extended discussion of a certain puzzle premium scheme and the throwing of the same upon a stereopticon screen, defendant told plaintiff to put his proposition in writing, which plaintiff did in the form of a letter containing the puzzle feature. This letter was marked Exhibit A, and offered in evidence by the plaintiff. After considering the letter, defendant told plaintiff that, if he would prepare an acceptance of the same, he would sign it. Whereupon plaintiff dictated to defendant's stenographer a letter of acceptance, omitting therein mention of the puzzle

feature. The defendant signed the same and plaintiff placed his acceptance thereon. This letter was marked Exhibit B, and offered in evidence by the plaintiff. These exhibits are as follows:

EXHIBIT A.

Mr. H. D. Cammack, President,

Cammack Piano Co.,

City.

Dear Sir:-

Referring to the writer's interview with you this morning we beg to put before you the following proposition:

We will print you full page advertisements in the programs of the Miles and Unique theatres of Minneapolis, weekly for the period of fifty-two weeks, at the rate of \$30.00 per month for each program, to be billed to you monthly at \$60.00.

We will give you the exclusive privilege in your line of business for the period of one year and will print no other piano advertisements in either of the two programs during the time of your contract with us, this provided that you accept our proposition on or before Monday, January 29.

As the writer has stated to you, we expect and aim to make the two programs of high grade, catering to the discriminating public and for that reason we will absolutely exclude all objectionable class of advertising.

The Miles theatre, newly rebuilt and beautifully decorated, with seating capacity of over 2,200 will be opened Feb. 12, with high class vaudeville, playing seven nights, two performances each and nine matinees during the week—twenty-three performances each week, with a seating capacity of over fifty thousand for same. It caters to high family trade, and plays at 10, 20 and 30c. Mr. Miles doubled the capacity of the house in order to accommodate the rapidly increasing patronage of his theatre, and as remodeled, the house will be not only the largest theatre in the Twin Cities but the largest and handsomest vaudeville house west of New York.

The Unique theatre plays four shows daily; the seating capacity is about twelve hundred and it plays to an average of twenty-five thousand people each week.

The combined circulation of the two programs will reach about seventy-five thousand people a week, and it will be taking a low average if we bring down the attendance of both theatres to two million and a half per year.

In order to make the program advertisements interesting to the audience, we will offer prizes for solving certain puzzles each week, these puzzles to be composed of various names of concerns that advertise in these programs. In order to solve a puzzle one will have to read the advertisements of the program. To the one solving the largest amount of puzzles during the year we will offer a grand prize of \$100.00 in cash.

The writer can assure you that we will spare no pains to make the programs most attractive and valuable to the advertisers.

Your truly, M. B. Dillion,

Gen. Mgr.

EXHIBIT B.

Advertising Service Bureau,
In Connection with American Poster Co.,
Minneapolis, Minn.

Gentlemen:

We beg to herewith give you our contract for full page advertisement in the programs in the Miles and Unique theatres of Minneapolis, weekly for the period of 52 weeks, at the rate of \$30.00 per month for each program to be billed to you monthly at \$60.00, total for the 12 months \$720.00.

It is understood that we have the exclusive privilege in our line of business for the above period with the privilege of renewing the contract for another year by giving notice of same 30 days before expiration of this contract.

It is understood that we have the privilege of changing the copy weekly in each program and if we so desire we may have a different copy in each program during the same week. We agree to furnish the copy on or before Wednesday of each week for the programs of succeeding week, otherwise the copy for current week will be repeated.

The contract begins with printing of the advertisement in the Unique

program for the week starting Feb. 4th and the Miles program the week starting Feb. 12th.

It is understood that you are to allow us a discount of 25 per cent for the first month on account of newness of the programs, but afterwards the amount of \$60.00 per month will be net.

> Yours very truly, Cammack Piano Company, By Mgr.

Accepted:
Advertising Service Bureau,
By M. B. Dillion,
Gen'l Manager.

With reference to these letters the witness Dillion testified on behalf of plaintiff, without objection, as follows:

- Q. Why did you write a letter to him? (Referring to Exhibit A.)
- A. I wrote a letter to him to tell him just what we had to offer. Cross-Examination.
- Q. Wasn't it also stated at that time that the contest which you stated you were going to run should be thrown upon the screens, stereopticon screens which would call the attention of the audience to it?
- A. I stated that I intended to do that, but I didn't guarantee Mr. Cammack to do that every day, and it was done.
 - Q. Isn't it also true that you never offered any grand prize of \$100?
- A. We did offer that, but we saw the interest of the public lacked and that was discontinued. There were only two or three contestants and it would be foolish to give \$100.

Plaintiff ran the advertisement, including the puzzle feature, for a considerable time; then, without defendant's consent, discontinued the same. Defendant became dissatisfied, paid the plaintiff in full for all advertising done to that time, June 1, and served notice upon the plaintiff canceling the contract. Plaintiff thereafter continued to run the ad, preparing the copy itself during the remainder of the year, and brought this action to recover the balance claimed to be owing therefor. according to the contract price.

The trial court found in favor of the plaintiff upon the theory that

the writing, Exhibit B, constituted the entire contract, and that Exhibit A was no part thereof; that the two letters should not be read together. and that plaintiff had fully performed the contract on his part.

It is the claim of the plaintiff that the letter, Exhibit B, was intended to be, and was, in fact, the full and complete contract between the parties to this action, and that Exhibit A should not be considered in connection therewith, while the defendant insists that the letter, Exhibit A, constituted a proposal of what the plaintiff had to offer and what it did offer in the line of advertising; that the letter, Exhibit B, was an acceptance thereof, and that the two writings constituted the contract between the parties.

Upon the trial much verbal testimony was received bearing upon the intention of the parties with relation thereto, all without objection. In the briefs and upon the argument in this court, this phase of the case was fully submitted, without reference to the assignments of error.

"Instruments executed at the same time, for the same purpose, and in the course of the same transaction, are, in the eye of the law, one instrument, and will be read and construed together." White v. Miller, 52 Minn. 367, 54 N. W. 736, 19 L. R. A. 673; Brackett v. Edgerton, 14 Minn. 134 (174), 100 Am. Dec. 211; Myrick v. Purcell, 95 Minn. 133, 103 N. W. 902, 5 Ann. Cas. 148.

We are of the opinion that the testimony, when considered as a whole, establishes the fact that the two letters were executed at the same time; that it was the intention of the parties that they should constitute the contract between them. When the plaintiff discontinued the puzzle feature mentioned in Exhibit A, it violated the terms of the contract, which justified the defendant in canceling the same.

Reversed.

NICHOLAS SCHMIDT v. CAPITAL CANDY COMPANY AND OTHERS.1

February 21, 1918.

No. 20,730.

Explosive — municipal ordinance construed.

1. Section two of Ordinance No. 2395 of the city of St. Paul considered and construed to prohibit the sale or disposition of such "fireworks and explosives" only, as are dangerous to persons or property on account of their dangerous character as explosives.

Same - seller answerable for proximate consequences.

2. The law requires of him who deals in articles inherently dangerous in the use for which they are intended, to refrain from placing the same in the hands of children of tender years, and where such sales are made and injury results, the seller is answerable for the consequences naturally and proximately resulting therefrom.

Judgment for defendants ordered.

3. The record in this case does not justify the conclusion that a better case can be established on another trial and the cause is remanded for judgment on the merits in favor of defendants.

Action in the district court for Ramsey county by the father of Marcella M. Schmidt, a minor, to recover \$50,000 for injuries received by the minor. The separate answers alleged carelessness on the part of the minor and her parents. The case was tried before Dickson, J., who when plaintiff rested denied defendants' motion for a verdict and a jury which returned a verdict for \$5,500. From an order denying their motion for judgment notwithstanding the verdict or for a new trial, defendants appealed. Reversed.

C. D. O'Brien, for appellants.

1Reported in 166 N. W. 502.

McNamara & Waters and P. J. McLaughlin, for respondent.

QUINN, J.

The defendant D. L. Clark Company is a Pennsylvania corporation, its place of business is in that state and it is engaged in the manufacture

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and sale of confectionery. The defendant Capital Candy Company was engaged in jobbing and wholesaling confectionery at the city of St. Paul, and the defendant Britt was a retailer of the same commodity in that city. The Clark Company had a separate trial and a verdict in its favor. The action then proceeded against the other defendants, resulting in a verdict for the plaintiff. From an order denying their motion for judgment notwithstanding the verdict, or for a new trial, defendants appealed.

The Clark Company sold to the candy company a quantity of confectionery, a portion of which consisted of what is known as "Clark's Electric Sparkler Suckers," and in turn the company sold, and on June 5, 1915, delivered to the defendant Britt, at St. Paul, a box of such sparklers. A sparkler of this kind consists of a piece of wire six inches in length and about the thickness of an ordinary pin. At one end of the wire and extending back about one-half its length is a chemical mixture in the form of a paste, in quantity sufficient, when dry, to form a stick resembling in size and appearance a small slate pencil, the wire forming the core thereof, and at the opposite end of the wire is a lump of taffy about the size of a black walnut. The chemical mixture is such that when a match is applied to the sparkler combustion ensues and white sparks are emitted. While the mixture is a mild explosive, it is not an explosive in the sense that it is dangerous to person or The sparks will not ignite the finest fabric, but while the mixture is burning away the wire becomes heated to such an extent that it will ignite parchment coming in contact with it at that time.

On August 15, 1914, Marcella M. Schmidt, the plaintiff, a child of seven years, purchased one of these sparklers from the defendant Britt for a penny. She then procured a match from the counter and went out onto the walk and lit the sparkler. Her clothes in some manner took fire and she was severely burned. It is the contention on behalf of the plaintiff, and so alleged in the complaint, that after the child applied the match to the sparkler, thereby causing the same to explode, sparkle and burn, and after the exploding and sparkling had ceased, her clothes, by reason of the dangerous character of the sparkler, were ignited and she was severely burned, the theory being, as we understand it, that, after the mixture had ceased burning, the wire came in contact

with her clothes and they were thereby set on fire. The proof is not conclusive as to just how the girl's clothes were ignited, whether from the match, from contact with the wire while the sparks were being emitted, or from contact with the wire after the sparks had ceased.

The plaintiff contends that the sale of the sparkler was in violation of Ordinance No. 2395, of the city of St. Paul, and that it was, therefore, actionable negligence on the part of the defendants to sell or dispose of the same. It is also contended that, even though the sparkler does not come within the prohibition of the ordinance, still it was such an inherently dangerous article as to render the seller liable under the common law.

Section 1 of the ordinance makes it unlawful for any person "to shoot or discharge any gun, revolver, pistol or firearms of any kind or description * * * or to shoot or discharge any preparation of chlorate of potash, mixture of sulphur and saltpeter, or other dangerous explosive, or any mud cans, so-called, toy cannon, loaded anvils or similar devices, or any giant or cannon crackers, or any firecrackers exceeding four inches in length, or any kind of fireworks or explosives whatever, dangerous to persons or property, * * * *" within or adjacent to the city.

Section 2 of the ordinance provides: "That hereafter it shall be unlawful for any person or dealer therein, at any time during thirty days next preceding the fifth day of July in each year, to sell, expose or offer for sale, or in any manner furnish or dispose of to any resident of the city of St. Paul, or to any other person for use in said city, or to any minor person at any time, any blank cartridge, pistol or revolver, * * *, or any of the explosives, fire crackers or fireworks, the use of which is prohibited in section one of this ordinance, and all such acts are hereby prohibited."

Does the article referred to as "sparkler" come within the meaning of this ordinance? If it does it would seem to be under the following provision: "or to shoot or discharge * * * any kind of fireworks, or explosives whatever, dangerous to persons or property." Considering this provision in connection with the whole section and giving it the ordinary meaning of the language employed, it can be understood to mean and refer only to such fireworks and explosives as are dangerous from their explosive character. Any other construction would carry the

meaning of the ordinance beyond its intent and purpose. It deals only with dangerous explosives, and excludes fire crackers not more than four inches in length.

Section 2 of the ordinance prohibits the sale of any such fireworks and explosives as come within the meaning of section 1. It follows that the sale of the sparkler in question does not come within the provisions of the ordinance and it was error to admit the ordinance in evidence.

Defendants contend that they were entitled to judgment notwithstanding the verdict. The law requires of him who deals in articles inherently dangerous in the use for which they are intended, to refrain from placing the same in the hands of a child of tender years. If the child is too young to realize the character of the thing sold him, it is the duty of the dealer to refrain from selling him such article, and where such sales are made the seller is liable for the consequences naturally and proximately resulting therefrom. 11 R. C. L. 704. Carter v. Towne. 98 Mass. 567, 98 Am. Dec. 682; Binford v. Johnston, 82 Ind. 426, 42 Am. Rep. 508. However, we do not think the article sold in the instant case so inherently dangerous as to render the seller liable, without proof of knowledge on his part of some concealed danger, not apparent from mere inspection. There is no such proof in this case. So far as we are advised by the record the danger of setting off the sparkler is no greater than that which is found in the ordinary match, carelessly lighted. The record will not justify the conclusion that a better case can be established on another trial, and a majority of the court are of the opinion that the cause should be remanded for judgment on the merits in defendants' favor. It is so ordered.

HALLAM, J. (dissenting).

I dissent. My opinion is that the question whether this article, designed for use by small children, was inherently dangerous for use by a child, was a question of fact for the jury.

COOPER, MYERS & COMPANY v. WALTER J. SMITH AND OTHERS.1

March 1, 1918.

No. 20,697.

Action against officer and his surety by purchasers of forged school warrant — notice of defects — complaint defective.

The state treasurer caused to be abstracted from the office of the state auditor a warrant drawn by the auditor on the treasurer in favor of a school district for a loan and caused the indorsement of the treasurer of the school district to be forged thereon. He then sold and delivered the warrant to the plaintiff, assuming to represent the school treasurer, and received checks payable to himself. The plaintiff indorsed the warrant and deposited it in its bank and the bank indorsed it and delivered it to another bank which received payment from the state treasury. Some months later the fraud and forgery and misappropriation were discovered, and the plaintiff, on pressure from state officials in which the official sureties of the treasurer participated, paid to the state what it received on the warrant with interest. In an action by the plaintiff to recover of the sureties it is held:

- (1) That the sureties were liable to the state for the treasurer's defalcation; that the plaintiff was liable to restore to the state the money of the state which it received on the stolen warrant though free of fault or negligence; that as between the sureties which contracted against the wrongful conduct of the treasurer in office, and the plaintiff purchasing the warrant in good faith and without notice or negligence and suffering from his official misconduct, the sureties should bear the loss; and that the plaintiff, having refunded to the state what it received, may recover of the sureties if it purchased the warrant in good faith and without notice or negligence.
- (2) That upon the facts stated and upon the issue between the plaintiff and the sureties the acts of misappropriation of the treasurer resulting in loss to the plaintiff and liability on its part to the state must be considered official, and as parts of one plan of misappropriation; and that the plaintiff having paid to the state the sureties cannot escape liability to reimburse it upon the theory that the acts of the treasurer in

¹Reported in 166 N. W. 504.

abstracting, forging and negotiating the warrant, and all acts which preceded payment, were personal and unofficial and separable from the final act of payment, and therefore that they are not liable to reimburse it though liable to the state before the plaintiff paid and though the payment by the plaintiff relieved them of such liability and though the act of payment was what involved both the sureties and the plaintiff in liability to the state.

(3) That in view of the facts recited and others stated in the opinion the complaint does not show that the plaintiff was without notice of defects in the warrant and free of negligence, though it contains an allegation that it purchased in due course and without notice.

Action in the district court for St. Louis county against Walter J. Smith, and the sureties on his official bond, to recover \$18,509. The United States Fidelity & Guaranty Company and Globe Indemnity Company demurred to the complaint, and the court, Cant, J., overruled the demurrers and certified that the question presented by each of the demurrers was important and doubtful. From the order overruling the demurrers, the defendants demurring appealed. Reversed on the point stated in the last paragraph of the opinion.

Cray & Eaton, for appellants.

The complaint failed to state a cause of action because:

- (1) Immediately the state was paid, the claim was extinguished and there was nothing to subrogate.
- (2) The doctrine of subrogation cannot be invoked in behalf of one situated as plaintiff was in this case, even assuming there was nothing irregular in the first transaction. The plaintiff, as far as the payment of the \$18,000 was concerned, was a mere voluntary stranger; hence he cannot recover under the rule that when one pays the debt of another, which he is then under no obligation to pay and does not by paying preserve and protect some interest in his own property, he is a mere volunteer and not within the equity of subrogation. Stearns, Suretyship, 467; Gadsden v. Brown, Spears, Eq. (S. C.) 37; Suppiger v. Garrels, 20 Ill. App. 629; Mavity v. Stover, 68 Neb. 602, 94 N. W. 834. This court is in absolute accord with this rule. Wentworth v. Tubbs, 53 Minn. 388, 55 N. W. 543. At the time plaintiff made the payment

of Smith's debt to the state, it was under no legal obligation to pay the debt and was therefore a volunteer under the rule. The complaint alleged that at the time plaintiff made the payment it contended it was not liable because it cashed the warrant. It claims it paid what it believed it was under no liability to pay. If there was anything that could be more effective in binding it absolutely by the volunteer rule, it was this allegation in the complaint by which plaintiff is bound. Under the terms of his bond to the state defendant Smith is the principal and these defendants are sureties. When defendant Smith by himself or another has paid to the state its moneys, all the claims are extinguished and there is consequently no obligation under the bond.

Through its treasurer plaintiff is charged with the knowledge that Smith could have no such legal control of the warrant as would authorize him to negotiate it or plaintiff to purchase it. The name of the treasurer of the school district on the back of the warrant, with Smith's statement, was notice to him that Smith could have no title to the warrant. It was not drawn on a Duluth bank when it was negotiated, but on the very person officially in whose possession it was.

- (3) Plaintiff's own negligent act was the cause of its loss, and it is barred in this action because it has violated the equitable doctrine that he who comes into equity must come with clean hands. It went outside the scope of legal and ordinary banking when it purchased this warrant. See National Surety Co. v. Arosin, 198 Fed. at page 607. Our state and Federal courts have adhered to the rule that in cases similar to this there can be no subrogation. Prairie State Bank v. U. S. 164 U. S. 227, 17 Sup. Ct. 142, 41 L. ed. 412.
- (4) Any action in respect to this transaction is barred by G. S. 1913, § 6998, subd. 2.

Fryberger, Fulton & Spear, for respondent.

1. Plaintiff was subrogated to the rights of the state the moment it paid the latter the \$18,000 and this is true whether it was actually liable or not, so long as there was a colorable claim that it was liable. The complaint alleged that the payment was made in the full belief that plaintiff was liable and on the representations of the officials and agents who were acting on behalf of the state and of defendant corporations,

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with full authority so to act, and in the full belief that plaintiff would be subrogated to any and all rights that the state had as against these defendants on said bond or otherwise. With these allegations admitted to be true, can any one seriously contend that plaintiff was a volunteer?

2. Plaintiff was actually liable to the state and on payment of the claim was subrogated to its rights against the bonding companies. The doctrine of subrogation really means an equitable assignment. The modern doctrine of subrogation, as applied to the facts in this case, probably is as well stated in Emmert v. Thompson, 49 Minn. 386, 52 N. W. 31, 32 Am. St. 566, as will be found stated anywhere in a Minnesota case. Is there any doubt as to who ought to stand the stealing of Smith—plaintiff company, which according to the complaint is entirely innocent and paid its money in good faith, or these bonding companies which for a very large premium signed a bond and guaranteed to the world that Smith was honest and would not steal the money from the state? The equities are so clear in favor of plaintiff that the question is not open to argument.

Section 6998, subd. 2, is a part of the statute of frauds. That deals with contracts only. The doctrine of subrogation is not founded on contract.

PER CURIAM.

139 M.--25

This action is brought by Cooper, Myers & Company, a corporation, against Walter J. Smith, former state treasurer, and the sureties on his official bond. The sureties demurred to the complaint and appeal from the order overruling their demurrer.

1. On May 29, 1915, the defendant, Smith, then state treasurer, caused to be abstracted from the office of the state auditor a warrant for \$18,000, drawn by the state auditor on the state treasurer in favor of a school district in Aitkin county for a loan, but not delivered, and caused the indorsement of the treasurer of the school district to be forged thereon. He then took it to Duluth, where the plaintiff did business, and received for it the plaintiff's checks for its face amount and they were paid in due course. The plantiff indorsed the warrant and deposited it in the City National Bank of Duluth, which indorsed it and sent it to the Merchants National Bank of St. Paul, which

received payment from the state treasury. The taking of the warrant and the forgery and the misappropriation were not discovered until the beginning of February, 1916. It was suggested by counsel for appellant on the argument that the termination in favor of the school district of certain litigation by way of injunction, which had prevented the use of the warrant before, rendered its use in the immediate future possible, and was the occasion of the discovery. See Evens v. Anderson, 132 Minn. 59, 155 N. W. 1040. Then upon pressure by the state officials, in which the sureties participated, the plaintiff paid the state the amount of the warrant, with interest, thereby rendering it whole upon Smith's defalcation and relieving the sureties of direct liability to it.

Under the facts stated the defendant surety companies were liable to the state on the official bond of the treasurer. Such was their contract. On well understood principles the plaintiff which got the state's money through a stolen instrument and through the aid of a forged indorsement, though innocent of actual wrong or of any fault or negligence, was bound to restore in the absence of any fact equitably preventing such result and none such is present. The question is whether being liable to restore and having done so its position is so much better than that of Smith's sureties that it may recover of them what concededly the state might have recovered. The question is this: In equity and good conscience should the plaintiff who innocently received the state's money through the fraud and defalcation of Smith and parted with an equivalent amount of his own, or the sureties who for a consideration contracted that Smith would be officially faithful, bear the loss? We feel no great hesitancy in holding that the loss should be that of the sureties.

A discussion of the principles applicable is not necessary. No case directly in point is cited. In National Surety Co. v. Arosin, 198 Fed. 605, 117 C. C. A. 313, it was held that a surety which paid to a county the amount of the defalcation of one of its officers, effected through spurious orders which were sold to a bank which purchased innocently and without notice, could not recover of the bank though the county might have done so. There the holding was that the position of the surety which paid was not better than that of the bank. Our holding is that the position of a bank paying under such circumstances is better than that of the surety. In principle, American Bonding Co.

- v. State Sav. Bank, 47 Mont. 332, and Stewart v. Commonwealth, 104 Ky. 489, are similar to the case just cited; but, as stated, none of them reached the point which we are required to decide. We are content to hold that as between sureties contracting against official misconduct and those suffering from it, the latter, paying an obligation resting upon the sureties as well, are superior in right.
- 2. The appellants cite National Surety Co. v. State Savings Bank, 156 Fed. 21, 84 C. C. A. 187, 14 L.R.A.(N.S.) 155, 13 Ann. Cas. 421. This is the same case, on the first appeal, as National Surety Co. v. Arosin, 198 Fed. 605, 117 C. C. A. 313. On the authority of this case they contend, and their argument is not without force, that the misconduct of Smith was not official, at least so far as concerns the plaintiff, so as to render his sureties liable to the plaintiff for the amount it was required to pay though in so paying it relieved them. If Smith had done nothing more than abstract the warrant from the auditor's office and forge the signature of the school treasurer, and sell it to the plaintiff, that is, if he had stopped short of misappropriating state money, we might have a different question, and one which we need not discuss nor determine now. It might then be that his misconduct was personal and unconnected with his office; and besides the state would not then have lost and neither the sureties nor the plaintiff would have become liable to the state. But he did not stop. He paid the spurious warrant out of state money, he contemplated doing so when he procured and negotiated the warrant, his fraud would hardly have been effective unless he did so, and the abstraction and forgery and sale and payment of the warrant were connected acts in one entire plan for the misappropriation of state funds which the pending litigation, since it prevented the immediate use of the warrant, gave the attractive opportunity.

In the case cited the wrongful acts were those of a deputy auditor of a county in this state. Some statements in the opinion are to the effect that his wrongful acts were not official misconduct. We would in any event be unable to adopt this view. In several cases decided by this court the same acts were held of a character making the deputy auditor a criminal and involving his sureties in civil liability. State v. Bourne, 86 Minn. 426, 90 N. W. 1105; State v. Bourne, 86 Minn. 432, 90 N. W.

1108; Board of Co. Commrs. of Ramsey County v. Elmund, 89 Minn. 56, 93 N. W. 1054; Board of Co. Commrs. of Ramsey County v. Sullivan, 89 Minn. 68, 93 N. W. 1056. And on the second appeal the Federal court held that the acts of the officer were misconduct in office for which the surety was liable and took occasion to define its former decision. The acts of the deputy auditor there involved were more clearly official than those of the treasurer here involved; but when the treasurer, in fulfilment of his original purpose, completed his fraudulent scheme of misappropriation of state money by paying the spurious warrant, thus making his sureties liable to the state, and putting a like liability upon the plaintiff, it is an over refinement, where the issue is between the sureties and the innocent purchaser of the warrant, to separate the acts constituting the fraud and hold that those preceding the payment were unofficial and therefore the sureties not liable to the plaintiff after it paid, though liable to the state until the plaintiff paid, and though the plaintiff's payment discharged their liability to the state. besides the payment of the warrant by the treasurer, which was concededly an official act, made the sureties directly liable to the state and involved the plaintiff in a like liability. Without it no one would have been liable to the state. We hold that under the facts stated and so far as concerns the application of the principles stated in paragraph 1 the acts which resulted in liability of the sureties and of the plaintiff to the state were official.

3. It is conceded that if the plaintiff had knowledge of the facts attending the issuance of the warrant, or notice which if pursued would have resulted in knowledge, or if it was negligent, it cannot recover.

The warrant was assignable but not negotiable. Its character suggested inquiry. It was in the possession of Smith whose apparent duty was to pay it. The state was in funds. Smith took it to Duluth assuming to do so at the request of the school treasurer. The plaintiff, through an officer who had known Smith well for many years, bought it at its face and gave checks payable to Smith. Smith was of good repute. No investigation was made. An inquiry at the state auditor's office would have disclosed all. The transaction was very unusual. The fact that Smith was in possession of the warrant, endeavoring to sell it, when he was directed by its terms to pay it, naturally would have

prompted inquiry. It does not appear how Smith's suggestion alleged in the complaint that it would be an accommodation to the school treasurer was of force, nor his further one that the plaintiff would profit by the treasurer not using it all at once, for he took the checks with him, and they were payable to himself. The situation presented to the plaintiff was one challenging inquiry and demanding the exercise of care.

In view of the facts recited, a majority of the court are of the opinion that the complaint does not sufficiently allege lack of knowledge or notice or the absence of negligence though there is a direct allegation that the plaintiff purchased in due course and in good faith and without notice. The minority view is that the general allegation is sufficient, notwithstanding the special facts pleaded having a tendency to show notice or negligence, and that the issues of notice and negligence are sufficiently tendered by the complaint and are properly determinable when the evidence comes in. The majority view leads to a reversal on the point stated in this paragraph only.

Order reversed.

STATE EX REL. CHARLES WILKINS AND ANOTHER v. J. A. TRYHOLM AND OTHERS.¹

March 8, 1918.

No. 20,887.

Change of venue - when foreign corporation is joined as defendant.

1. In actions not made local by the provisions of sections 7715 to 7720, G. S. 1913, a resident defendant is not deprived of the right to have the place of trial changed to the county of his residence by joining a foreign corporation as a party defendant.

Venue — action on bond of public contractor transitory — statute inapplicable.

2. Actions upon the bonds of public contractors are not made local under the provisions of sections 8245 to 8249, G. S. 1913.

Upon the relation of Charles Wilkins and Royal Indemnity Company of New York, the supreme court granted its alternative writ of man
1Reported in 166 N. W. 533.

damus commanding J. A. Tyrholm & Company and Honorable Arthur E. Childress, judge of the Fifth judicial district, in and for Waseca county and the clerk of that court, to transmit the files in an action between J. A. Tyrholm & Company, as plaintiffs, and relators, as defendants, to the clerk of the district court for Hennepin county and temporarily prohibiting the trial of the action in Waseca county or show cause why the writ of mandamus should not be made peremptory. Peremptory writ ordered.

Laybourn & Cary, for relators. Henry M. Gallagher, for respondents.

PER CURIAM.

Upon the petition of relators an alternative writ of mandamus, issued out of this court, directed the judge and clerk of the district court of Waseca county to cause an action begun in said court, wherein J. A. Tyrholm & Company, is plaintiff and Charles Wilkins and the Royal Indemnity Company, the relators, are defendants, to be transferred for trial to the district court of Hennepin county, Minnesota, or show cause why it should not be done.

It is made to appear that Charles Wilkins now is and for many years has been a resident of Hennepin county. The Royal Indemnity Company is a New York corporation. The action brought against relators is for the recovery of \$165 alleged to be due for material and labor furnished by said J. A. Tyrholm & Company, in installing, at the request of said Wilkins, an engine in a public school building erected by Wilkins under a contract with a school district in Waseca county. The complaint alleges that Charles Wilkins as principal and the Royal Indemnity Company as surety had executed to the school district the bond demanded by section 8245, G. S. 1913, to secure the performance of the contract, as provided by its terms and the statute mentioned. Within 20 days after the service of the summons Wilkins made proper demand for a change to venue to Hennepin county, and both defendants, also within said time, made a joint demand for such change. The requests were refused.

The refusal is sought to be justified under sections 7720, 7721 and 8245-8249, G. S. 1913.

The action is not for recovery of wages or money due for manual labor so as to come under said section 7720, providing that the venue in suits for the recovery of money so earned shall be brought in the county where the labor was performed.

Section 7721 provides that actions not covered by sections "7715-7720 shall be tried in a county in which one or more of the defendants reside when the action was begun. If none of the parties shall reside or be found in the state, or the defendant be a foreign corporation, the action may be begun and tried in any county which the plaintiff shall designate." The following section (7722) gives the defendant the right to demand a change of venue when an action is not brought in the proper county under the rules laid down in the preceding sections above referred to.

In view of the fact that it is the policy of our law to accord a resident of this state the privilege of having a transitory action brought against him tried in the county of his residence (Grimes v. Ericson, 92 Minn. 164, 99 N. W. 621), it is considered that he may not be deprived of this privilege by making a foreign corporation also a party defendant. The provision quoted from section 7721, giving the plaintiff the right to select the county wherein to maintain the action, should be construed to be limited to cases wherein there are no resident defendants. In Healy v. Mathews, 108 Minn. 125, 121 N. W. 428, relied on by respondents, the foreign corporation was the sole defendant, and the action was properly commenced in the county where the plaintiff chose to institute the same.

We do not think there is anything in the sections 8245-8249, G. S. 1913, which necessarily makes an action upon a bond of a public contractor local, instead of transitory.

Let a peremptory writ issue.

ALBERT UPHOFF v. G. W. McCORMICK.1

March 15, 1918.

No. 20.691.

Registration of automobile evidence of ownership - finding sustained.

1. In an action for negligence in the operation of an auto the statute (G. S. 1913, § 2643), makes registration evidence of ownership; and the evidence is held to sustain a finding that the defendant was the owner of an auto at the time the plaintiff sustained injuries by a collision with it.

Negligence - liability of owner - finding sustained.

2. The evidence sustains a finding that the auto was used at the time with authority of the defendant for family purposes for which it was kept and that he was liable for the negligence of the driver.

Action in the district court for Lyon county to recover \$1,443 for injuries to person and property received in collision with an automobile of defendant driven by his servant. The answer alleged carelessness and negligence on the part of plaintiff. The case was tried before Olsen, J., who when plaintiff rested denied defendant's motion to dismiss the action, and at the close of the testimony separate motions for a directed verdict in favor of each party, and a jury which returned a verdict for \$300. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Tom Davis and Ernest A. Michel, for appellant.

E. V. Molle, for respondent.

'DIBELL, C.

The plaintiff had a verdict for injuries sustained in a collision with an auto driven by the defendant's son. The defendant appeals from the order denying his alternative motion for judgment or a new trial. The negligence of the son is conceded. The questions are:

1Reported in 166 N. W. 788.

- (1) Whether the defendant owned the auto.
- (2) If so, whether the use of it by his son at the time was under circumstances making him liable for his negligence.
- 1. The defendant bought the auto in June, 1916. He claims that he sold it to his son a week or two later. The collision occurred in the following October. The auto was registered in the name of the defendant and at the time bore the registration number assigned to him. Under the statute this is prima facie evidence of ownership. G. S. 1913, § 2643. The testimony of the father and the son is that the latter purchased the auto of his father for \$800, trading in some cattle for \$400 and agreeing to pay the balance when he could. A neighbor corroborates them to the extent of saying that he overheard a conversation between them relative to a sale for \$800. The fact and the terms of sale do not more positively appear. The son was between 21 and 22 years old, lived at home with his father on the farm, and worked for him under an arrangement not definitely shown. He became the owner of the cattle when living at home and while under age. His exact claim of ownership is not clearly shown. The transaction between him and his father is left vague and uncertain; nor does it conclusively appear that such negotiations as there were between them looking toward a sale were actually consummated. The statute giving effect to registration in proof of ownership is not intended to make a jury question in every case. The direct evidence as to ownership may be such as to require a peremptory instruction. The evidence before us is such as well enough to sustain a finding of a sale. The jury did not find so. It found that the ownership was in the defendant, and the trial court after a fair trial approves the result. The case is not one, at least in view of the statute, where the testimony of witnesses not directly contradicted requires a finding in accordance therewith. See Jensen v. Fischer, 134 Minn. 366, 159 N. W. 827; Olsson v. Midland Ins. Co. 138 Minn. 424, 165 N. W. 474, and cases. The finding of ownership is sustained.
- 2. At the time of the collision the defendant's son was returning from a dance. The defendant's daughter went with him and was returning with him. The defendant knew that they were going. The auto was used from time to time for family purposes. Conceding that the defendant owned it, as the jury found, the evidence sustains a finding that the

use of it at the time was with his authority and for family purposes for which it was kept. Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745, and cases cited; Jensen v. Fischer, 134 Minn. 366, 159 N. W. 827. If so he was liable for his son's negligence.

Order affirmed.

CATHERINE PIERRO V. CITY OF MINNEAPOLIS.1

March 15, 1918.

No. 20.715.

Adverse possession — possession of platted street by abutting owner not hostile.

In order to prove title by adverse possession it is necessary to prove, not only possession, but hostile possession. When a street is dedicated by plat, the city may choose its own time to occupy, open and use the street, and, until it does so, possession of the street by the abutting owner who owns the fee of the street, is not regarded as hostile and the statute of limitations will not commence to run.

Action in the district court for Hennepin county to determine adverse claims to land in the possession of plaintiff. The answer alleged that in an action brought by the city of Minneapolis against the plaintiff in this action, the district court in the year 1916 rendered judgment awarding to the city possession of the land described in the complaint, together with damages for its detention, and that judgment had never been set aside, modified or reversed. The case was tried before Molyneaux, J., who made findings and ordered judgment in favor of defendant. From an order denying her motion for additional findings and conclusions, plaintiff appealed. Affirmed.

Healy & La Du, for appellant.

James D. Shearer and L. B. Byard, for respondent.

HALLAM, J.

Bottineau's Second Addition to the town of St. Anthony, now in the ¹Reported in 166 N. W. 766.

city of Minneapolis, was platted in 1855. Between blocks 6 and 7, Warren street, later known as Twentieth avenue northeast, was dedicated to the public. This street was never actually opened to public travel. In 1878 plaintiff's husband acquired part of block 7 and plaintiff and her husband together acquired the balance of said block and all of At this time; blocks 6 and 7, together with the portion of Warren street that lay between them were inclosed as one parcel, and plaintiff and her husband occupied the whole inclosure until 1905 and cultivated the same for market garden purposes. They erected a dwelling house on block 7. In 1905 plaintiff was divorced from her husband and by the decree she was given her husband's interest in these blocks, described by reference to the plat. Plaintiff's possession thereafter continued. In 1915 the city of Minneapolis condemned blocks 6'and 7 for park purposes and compensation was made to plaintiff therefor. In the proceeding the property was described as "Block six" and "Block seven" of Bottineau's Second Addition. No mention was made of the intervening street.

Of course, the fee title to the street was always in plaintiff. If it was still a street, however, it is conceded that the description in the condemnation proceeding of blocks six (6) and seven (7) was sufficient to take the intervening street as well as the adjacent blocks particularly described. Plaintiff's contention is that, by adverse possession of her husband and herself, she has barred the public easement in Warren street and that, since Warren street is no longer a street, it is a distinct parcel of unencumbered land and did not pass by the condemnation of blocks 6 and 7.

It is evident, therefore, that if plaintiff's claim of adverse possession fails, her whole case must fail. The trial court found against her on this issue. That is, the court found that the occupation of the street by plaintiff and her husband was not adverse but was in subordination to the public right.

This ruling was right. In order to prove title by adverse possession, it is necessary to prove, not only possession, but hostile possession. It is settled law in this state that when a street is dedicated by plat, the city may choose its own time to occupy, open and use the street, and until it does so, possession of the street by the abutting owner is not regarded as

hostile and the statute of limitations will not commence to run. St. Paul & Duluth R. Co. v. City of Duluth, 73 Minn. 270, 76 N. W. 35, 43 L. R. A. 433. This is the prevailing rule. Henshaw v. Hunting, 1 Gray, 203; Town of Derby v. Alling, 40 Conn. 410; McClenehan v. Town of Jesup, 144 Iowa, 352, 120 N. W. 74; Reilly v. City of Racine, 51 Wis. 526, 8 N. W. 417. The same rule obtains as to private ways (Smyles v. Hastings, 22 N. Y. 217), and also as to occupation by a proprietor of contiguous land of property subject to a railroad company's easement of right of way. Sapp v. Northern Cent. Ry. Co. 51 Md. 115; Railroad v. French, 100 Tenn. 209, 43 S. W. 771, 66 Am. St. 752; Union Pacific Ry. Co. v. Kindred, 43 Kan. 134, 23 Pac. 112; Dulin v. Ohio River R. Co. 73 W. Va. 166, 80 S. E. 145, L. R. A. 1916B, 653, Ann. Cas. 1916D, 1183.

What the right of plaintiff might have been had she acquired complete title by adverse possession, is a question not before us and that we do not determine.

Judgment affirmed.

JENNIE CASTLE v. UNION PACIFIC RAILROAD COMPANY.1

March 15, 1918.

No. 20,735.

Federal Employer's Liability Act — death from negligence — evidence.

1. In an action under the Federal Employer's Liability Act to recover for the alleged wrongful death of plaintiff's intestate, the evidence is held sufficient to sustain the charge of negligence made the basis of the action, and to establish with sufficient certainty the fact that the death complained of was caused thereby; the evidence takes that question beyond the field of conjecture and speculation.

Same - reduction of verdict.

2. The damages are held excessive and a reduction thereof is ordered as a condition to denying a new trial.

Action in the district court for Hennepin county by the administratrix ¹Reported in 166 N. W. 767.

of the estate of Clarence E. Castle, deceased, to recover \$25,000 for the death of her intestate. The answer alleged decedent's death resulted directly from risks of his employment which he had assumed as part thereof. The case was tried before Waite, J., who denied defendant's motion for a directed verdict, and a jury which returned a verdict for \$20,000. Defendant's motion for judgment notwithstanding the verdict or for a new trial was denied. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed, provided plaintiff consented to a reduction of the verdict to \$16,000.

A. G. Ellick and Edward P. Sanborn, for appellant. George C. Stiles and D. C. Edwards, for respondent.

Brown, C. J.

Defendant owns and operates a line of railroad in and through several different states, is a common carrier and engaged in interstate commerce. Plaintiff's intestate, who was her husband, was in the employ of defendant in its interstate service in the capacity of switchman in the yards of the company at Council Bluffs, in the state of Iowa. While engaged in the discharge of his duties on August 25, 1916, he was run over and killed by a switch engine, around and in connection with which he was engaged in making up interstate trains. Plaintiff was subsequently duly commissioned administratrix of his estate and brought this action to recover the damages caused by his death to his next of kin. She had a verdict in the court below upon which, after a denial of defendant's motion for judgment or a new trial, judgment was duly rendered, from which defendant appealed.

The assignments of error present the general questions whether the evidence supports the verdict of negligence on the part of defendant, and whether the damages awarded by the jury are excessive.

The evidence, in respect to which there is no substantial dispute in the record, discloses the following facts: Decedent was a member of the night switching crew, and upon the occasion in question entered upon the discharge of his duties at about 8 o'clock in the evening, though switching operations were not commenced for about half an hour later; he was killed within 15 or 20 minutes after engaging in the particular work. The crew consisted of the engineer and fireman, in charge of the

engine, a foreman, decedent and another switchman. The engine had been prepared for the service by a roundhouse hostler and by him supplied with the necessary water and coal, and was supposed and understood to be in proper condition for use when turned over to the switching crew. The engine was equipped with the usual foot-boards extending across the front and rear ends thereof, upon which the switchman rode when moving about the yards in the switching operations, getting upon the same both when the engine was under movement and when it was stationary. One or two short switching movements had been made with the engine prior to the accident, and the third, which resulted in the death of decedent, occurred a little before 9 o'clock. At that time decedent and the foreman were standing by one of the yard tracks, the foreman on one side and decedent on the other side, awaiting the approach of the engine, which each intended to board in the usual manner, namely, by stepping upon the foot-board as the engine came up to them, and thereon riding to the end of that switching movement. The engine was running backward, pulling several cars to be switched upon a particular track there to become a part of an interstate train being then made up. The foreman stepped upon the foot-board in safety, but decedent in some way slipped and fell between the rails of the track and was run over and killed.

It is claimed by plaintiff, and herein is found the charge of negligence upon which she relies for recovery, that defendant had carelessly and negligently permitted a quantity of coal, in particles ranging from dust to pieces of the size of a walnut, to be and remain upon the particular foot-board, rendering the same dangerous and unsafe for use, in consequence of which decedent slipped when he stepped thereon and was thus caused to lose his balance and fall upon the track.

The allegations of the complaint in this respect were put in issue by the answer, but on the evidence presented the trial court and jury sustained plaintiff's view of the case, in doing which defendant contends that there was manifest error for the reasons: (1) That the evidence wholly fails to show how or in what manner the coal came upon the foot-board, or to charge defendant with responsibility therefor; (2) that no witness testified that the presence of the particles of coal made the foot-board dangerous to those required to use it and (3) that whether

decedent was injured in consequence of that condition of the foot-board is left by the evidence so conjectural and uncertain as not to justify a verdict against defendant.

We have given the record careful attention with the result that sufficient evidence is found therein to support the verdict as to each of these points. A brief reference thereto may be made.

- 1. The evidence makes it clear that the particles of coal were upon the foot-board at the time of the accident. The foreman of the crew and the other switchman both testified to that fact, and their information came from a personal inspection of the foot-board immediately after the accident. They found a "double handful" of the size stated spread over the board from which decedent had fallen. There was no direct testimony in explanation of its presence or as to how it came there. But we think the evidence fully justified the jury in finding that it came there at the time and as a result of coaling the engine a short time before it was turned over to the crew for the night's work. The head hostler testified to coaling the engine, and further that on completing the work he brushed off the foot-boards and removed all particles of coal that had scattered over the edge of the tender during the coaling operations. But the jury was not bound to accept his statement as expressing the fact, and was justified in concluding that he was mistaken. There had been no movement of the engine after it was turned over to the switchmen of a character to jar coal from the tender or to explain how it otherwise may have reached the foot-board, and it seems clear that it was thereon when the men received it from the hostler. The record presents no reason for discrediting the foreman and the other switchman who testified to the fact of its presence immediately after the accident.
- 2. While no witness was produced who gave evidence to the effect that the foot-board by reason of the particles of coal thereon was dangerous and unsafe for use, we think and so hold that the evidence, taken as a whole, made the question one of fact for the jury. In view of the general purpose of the foot-board, and the manner in which the switchmen in the regular discharge of their duties get upon the same when the engine is in motion, the danger to them from a deposit of loose coal thereon would seem too obvious to require specific proof to that effect. In fact the defendant recognized such danger and to avoid the same.

and in protection of the switchmen, imposed upon the hostler the duty of removing any quantity that might be scattered thereon in coaling the engine, before turning the engine over to them. The imposition of this duty upon the hostler is not disputed and, in the absence of a contrary showing, we are justified in assuming that the only purpose thereof was in furtherance of the obligation of the company to provide for the switchmen a safely equipped instrumentality for the discharge of their duties.

3. The third contention of defendant presents the only serious question upon this branch of the case, but we conclude that this also was made an issue of fact by the evidence, and that the verdict is sufficiently supported. It was not essential to plaintiff's case that direct evidence be presented to the effect that decedent slipped upon the particles of coal. The fact could as well be established by circumstantial evidence. Mitton v. Cargill Ele. Co. 124 Minn. 65, 144 N. W. 434; Hurley v. Illinois Cent. R. Co. 133 Minn. 101, 147 N. W. 1005. And though the rule in such cases is that the circumstantial evidence must tend to substantiate the claim that the accident in fact happened or was brought about by the alleged cause, as well as the fact that it could have happened therefrom (Rogers v. Minneapolis & St. L. Ry. Co. 99 Minn. 34, 108 N. W. 868), we find ample evidence to sustain the claim that the coal upon the footboard was the immediate and therefore the proximate cause of decedent's fall upon the track as he attempted to board the engine. In addition to the account given by the only eye-witness, the foreman of the switching crew, the position of the body after the accident furnishes most persuasive and confirmatory evidence in support of that view of the question. Decedent attempted to step upon the foot-board as the engine approached at the rate of about 4 miles an hour, and was discovered by the foreman, who had safely taken his position on the engine, in the act of falling to the ground, his feet extending to the side of the track opposite that from which he made the attempt, and his head and arm falling upon the rail over which he stepped in doing so. His position indicated clearly that his feet had slipped from under him, thus causing him to fall in the manner stated. If he had tripped over the rail, as suggested by counsel for defendant, he would necessarily have fallen forward, and his head would have been where his feet were when the accident was over. All this indicates beyond mere conjecture or speculation that the accident happened in the manner contended by plaintiff, and is sufficiently direct and certain within the rule in such cases. Mitton v. Cargill Ele. Co. and Hurley v. Illinois Cent. R. Co. supra; Choctaw, O. & G. R. Co. v. McDade, 112 Fed. 888, 50 C. C. A. 591; Philadelphia & R. Ry. Co. v. Marland, 239 Fed. 1, 152 C. C. A. 51. The contention that decedent assumed the risk is without substantial merit.

4. The rule of damages in an action of this kind is the same as that followed by the Federal courts in like cases, and permits a recovery of compensatory damages only, based upon the pecuniary loss of the next of kin. Nash v. Minneapolis & St. L. R. Co. 131 Minn. 166, 154 N. W. 957. In that case the next of kin consisted of the widow and 2 children, 3 and 5 years of age, respectively. In the case at bar the widow and 3 children remain as next of kin, the ages of the children being 4, 6 and 10 years. The earning capacity of decedent in that case was not substantially different from the earning capacity of decedent in this case. We there held that \$18,000 was an excessive award of damages, and the verdict was ordered reduced to \$12,000. The situation presented in each case is similar, and there are no substantial differentiating facts. The award in this case was \$20,000. Within the rule applied in that case the amount is excessive and there must be a new trial or a reduction of the verdict.

It is therefore ordered that unless plaintiff, within 10 days after the cause is remanded to the court below, shall file a consent to a reduction of the verdict to the sum of \$16,000, a new trial will be and is hereby granted. If the consent be so filed the judgment appealed from, as thereby modified, will be and is affirmed.

It is so ordered.

STATE v. A. S. BROMS.1

March 15, 1918.

No. 20,746.

Criminal law — disorderly conduct — complaint sufficient.

- 1. The complaint is sufficient under State v. Olson, 115 Minn. 153. Same defendant not entitled to jury trial.
 - 2. The prosecution being under an ordinance defendant was not entitled to a jury.

Same — statement of trial judge as to evidence not equivalent to findings — assignments of error.

3. Errors cannot well be assigned upon the items of a statement of the trial judge as to what the evidence established. The ultimate finding to be made was whether defendant was guilty or not guilty of the offense charged.

Same — conviction sustained by evidence.

4. The evidence sustains the finding that defendant was guilty of violating the city ordinance relating to breaches of the peace and disorderly conduct.

Defendant was accused of violation of the ordinance of Minneapolis prohibiting disorderly conduct, tried in the municipal court of that city before Charles L. Smith, J., found guilty, and sentenced to hard labor in the workhouse of Minneapolis for 90 days. From the judgment and an order denying his motion for a new trial, defendant appealed. Affirmed.

A. W. Uhl, for appellant.

Lyndon A. Smith, Attorney General, James E. Markham, Assistant Attorney General, C. D. Gould, City Attorney, John T. O'Donnell and Thomas B. Kilbride, Assistant City Attorneys, for respondent.

HOLT, J.

The charge was: "That at and within the corporate limits of Minneapolis, on the 13th day of September, 1917, the defendant then and

¹Reported in 166 N. W. 771.

there being, did wilfully, wrongfully and unlawfully make, aid, countenance and assist in making a noise, riot, and disturbance and improper diversion in a public place, and did collect with bodies and crowds for unlawful purposes, to the annoyance and disturbance of the citizens and travelers then and there being and passing, contrary to the provisions of an ordinance" of said city. The trial resulted in a conviction. Defendant moved for a new trial and appeals from the order denying the motion and from the judgment.

The defendant was arrested while in the alleged act of violating the ordinance, and at once brought before the municipal court of Minneapolis where the charge was made on the "tab" of the clerk in the language above set forth, which in substance is the wording of the ordinance defining and punishing disorderly conduct in public places. He pleaded not guilty, and went to trial without raising any objection to the form of the complaint.

The contention that the complaint is insufficient is decided to the contrary in State v. Olson, 115 Minn. 153, 131 N. W. 1084, which case also distinguishes the one at bar from State v. Swanson, 106 Minn. 288, 119 N. W. 45.

The prosecution being for a violation of a city ordinance, it is settled that defendant was not entitled to a jury trial. City of Mankato v. Arnold, 36 Minn. 62, 30 N. W. 305.

At the conclusion of the testimony the trial court, preliminary to pronouncing defendant guilty, recited what the evidence proved the defendant to have said in causing the disturbance. This recital appellant treats as findings of fact and assigns error upon the several parts thereof. We do not think these statements of the court should be so considered. The ultimate finding required by the law and practice was whether defendant was guilty or not guilty of the charge upon which he was tried, and the real question by all these assignments of error is the sufficiency of the evidence to sustain the charge.

The defendant styles himself a socialist organizer and had chosen a public street in the city as the place to promulgate his views and gain adherents. More than a hundred persons quickly congregated about him as he held forth. Witnesses for the prosecution testified that he publicly denounced President Wilson and Governor Burnquist as grafters; that

he said the President was a lawbreaker in sending drafted men out of the boundaries of our country to fight; that he sneeringly referred to our flag as "that thing;" and that the crowd became excited and sought to get at him, but were kept back by policemen and a soldier present. To a certain extent defendant's own witnesses corroborate the prosecution in these matters. Defendant places a different interpretation upon his reference to the flag, and claims that he only questioned the President's right to order the militia into foreign service. However that may be, the question is not so much whether what defendant said, in and of itself, violated any law, but whether, considering the time and place, his words and action aided and assisted in making a disturbance or improper diversion in a public place.

It is perfectly plain that in times such as these, for one to publicly say or do things which might be taken as an attempt to belittle the nation's flag, or charge the commander in chief of the army and navy with flagrant crimes and wrongs, is sure to start a riot and a disturbance of the worst sort. When a nation is at war, its patriotic citizens are quick to resent such talk as defendant indulged in. It is no defense to say that the audience would have no right to take the law into its own hands.

This ordinance is directed against provoking a breach of peace in a public place. People v. Burman, 154 Mich. 150, 156, 117 N. W. 589, 25 L.R.A.(N.S.) 251, sustained a conviction under a similar ordinance. Defendants there had carried a red flag in a parade, thereby infuriating the public. The court said: "It is idle to say that the public peace and tranquility was disturbed by the noise and violence, not of defendants, but of those whose sentiments they offended. When defendants deliberately and knowingly offended that sentiment, they were responsible for the consequences which followed, and which they knew would follow." The same principle is made to support the conviction in People v. Most, 171 N. Y. 423, 64 N. E. 175, 58 L. R. A. 509, and Commonwealth v. Oaks, 113 Mass. 8.

Defendant asserts his constitutional right to freedom of speech. We do not think the question is involved. He has no constitutional right by means of the privilege of freedom of speech to force his thoughts upon the attention of the public in public places in such manner that riot and disorder will inevitably result.

The order and judgment must be affirmed.

IN THE MATTER OF PROCEEDINGS TO ENFORCE PAYMENT OF TAXES.

STATE v. MINNEAPOLIS & ST. PAUL SUBURBAN RAILWAY COMPANY AND ANOTHER.1

March 15, 1918.

No. 20,758.

Railway — right of way not taxable when company subject to gross earnings tax.

Defendant suburban railroad company operates certain lines of street and trolley railroad on the tracks of the Minneapolis street railway company along the city streets to Thirty-first street and Hennepin avenue. From this point to the city limits, a distance of two miles, the lines are operated, not along the city streets, but on the private right of way of defendant. It is held that this right of way is not subject to an ad valorem tax, the lines not being a street railway after they leave the city streets, and defendant being subject to a tax on the gross earnings of the lines after they enter upon such private right of way.

In proceedings in the district court for Hennepin county to enforce payment of real estate taxes remaining delinquent on the first Monday of January, 1916, the Minneapolis & St. Paul Suburban Railway Company and the Minneapolis & St. Paul Suburban Railroad Company served their joint and several answer. The matter was heard before Hale, J., who made findings and ordered judgment in favor of defendant railroad company. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Affirmed.

John M. Rees, County Attorney, and Frank J. Williams; Assistant County Attorney, for appellant.

W. D. Dwyer, for respondents.

Bunn, J.

Taxes for the year 1914 were levied against real estate owned by delargered in 166 N. W. 770. fendant The Minneapolis & St. Paul Suburban Railroad Company. This real estate is the right of way of the company between Hennepin avenue and Thirty-first street and the city limits of Minneapolis, a distance of two miles. Defendant answered in the proceedings, claiming that it was a railroad company, that the real estate was used for railroad purposes and therefore was not subject to an ad valorem tax. Defendant operates three lines over this right of way, the Minnetonka line extending from Sixth street and Hennepin avenue to Excelsior and beyond on Lake Minnetonka, the Deephaven line, extending from the same point of beginning to Deephaven, and the Como-Hopkins line, extending from St. Paul through Minneapolis to Hopkins. Each of these lines is operated in Minneapolis over the tracks of the street railway company up to the point where the cars enter the private right of way of defendant at Hennepin avenue and Thirty-first street.

The trial court held that the right of way was not subject to an ad valorem tax, and rendered judgment in favor of defendant. The state appeals.

The question is at what point the lines operated by defendant cease to be "street railways," within Laws 1909, p. 552, c. 454. If it is at the point where they enter the private right of way of defendant, the decision below was right. If it is the city limits of Minneapolis, the gross earnings law does not apply, and the right of way within the city limits is subject to an ad valorem tax. The state claims that this case is ruled in its favor by State v. Minneapolis & St. P. S. Ry. Co. 122 Minn. 106, 142 N. W. 19. Reading that case by itself, it gives ground for the contention, in that it upheld the rights of defendants, the suburban companies, to deduct in their report of gross earnings all money received by them for the transportation of passengers within the cities of St. Paul and Minneapolis, and to report only the fares received outside those cities. But the fact that for two miles in the outskirts of Minneapolis, but within the city limits, defendants operated the cars over their private right of way and not along the city streets was not mentioned. feature was present, however, in State v. Minneapolis & St. P. S. Ry. Co. 114 Minn. 70, 130 N. W. 71. That case involved the St. Paul-Stillwater line, and the proceedings were to enforce payment of personal property taxes against the suburban company, the taxes being levied on

property located within the city of Stillwater, the village of South Stillwater, the town of Baytown and the town of Stillwater. The claim of the company was that it was a railroad, within the meaning of Laws 1909, p. 552, c. 454, was therefore subject to a gross earnings tax, and not liable to pay ad valorem taxes. The line operated by defendant extended from St. Paul over its own right of way to the westerly limits of Stillwater and for a distance of 3,600 feet inside of the city limits to a power house at North Owen and Laurel streets. Beyond this it operated over the city streets and public highways. It was distinctly held that the line operated within the city of Stillwater from the power house on North Owen street, and the lines operated on Owen street and to South Stillwater were street railways, within the exception provided in chapter 454, and that property of the company located in the city, village or town, and used in the operation of such lines therein, was subject to taxation. But it was just as definitely held that the line operated between the power house on North Owen street and the city of St. Paul was not a street railway, but an interurban or trolley line, within the provisions of chapter 454, and taxable under the gross earnings law. The court was particular to fix the dividing line at the point where the company left its own right of way and began to operate on the streets of Stillwater, and not at the city limits. stated, this point was 3,600 feet inside of the limits of Stillwater.

There is no distinction in principle between the Stillwater case and the one at bar. The only difference is that here defendant operates along its own right of way for a distance of two miles within the limits of Minneapolis before reaching the country outside, while in the Stillwater case the distance was 3,600 feet, or approximately two-thirds of a mile. Of course this does not distinguish the two cases. That the court in the Stillwater case deliberately and intentionally fixed the point where defendant ceased to be a "street railway" and became an "interurban or trolley line" at the point where it ceased to use the city streets and entered upon its private right of way, is clear both from the definite language used in describing the line and its limits, and from the discussion in the opinion as to the features that distinguish a "street railway," and a railroad. The court quoted from Minneapolis & St. P. S. Ry. Co v. Manitou Forest Syndicate, 101

Minn. 132, 112 N. W. 13, in which we said that "the essential and predominant distinction is that a street railway is operated upon the street in aid of the street as a highway," and cited Newell v. Minneapolis, L. & M. Ry. Co. 35 Minn. 112, 27 N. W. 839, 59 Am. Rep. 303, and other cases.

As stated by the Chief Justice in State v. Minneapolis & St. P. S. Ry. Co. 122 Minn. 106, 142 N. W. 19, "we are impressed that defendant companies, and others similarly incorporated, and operating partly within and partly without municipalities should be either commercial or street railways and not be burdened with both characters." But as long as the duty is that of the courts to determine at what point a line ceases to be a street railway and becomes a commercial railway, there is reason in making the point that at which the railway ceases to use city streets or public highways without compensation to abutting owners, and acquires its own right of way. This is a less arbitrary point than the city limits. Except that the lines of defendant cross city streets between Thirty-first street and the city limits, they partake as much of the character of a commercial railroad while traversing this two-mile stretch as they do after they leave the city limits. The trains are operated at a high speed and make but four stops from Thirty-first street to the city limits. They are not operated under any franchises granted by the city of Minneapolis. It is in evidence that defendants have in prior years, in reporting their earnings for the compilation of the gross earnings tax, deducted five cents for each passenger getting on or off within the city limits, including those getting on or off at any of the stops between Thirty-first street and the city limits. We do not regard this as a controlling fact, though it is manifest that earnings on the two-mile stretch should be included in the gross earnings upon which the tax is computed.

It is unnecessary to decide whether the decision of the trial court can be upheld on the ground that the state is estopped by judgments in favor of defendant for the taxes of prior years.

Judgment affirmed,

STATE EX. REL. LONDON & LANCASHIRE INDEMNITY COMPANY v. DISTRICT COURT OF HENNEPIN COUNTY AND ANOTHER.¹

(RUSH v. INDEMNITY COMPANY.)

March 15, 1918.

No. 20.840.

Workmen's Compensation Act — death — evidence.

1. The evidence sustains the finding that the death of plaintiff's husband resulted from injuries which he sustained while engaged in the performance of his duties.

Same - when statute can make presumption conclusive.

2. The legislature can make a presumption conclusive unless such presumption would impair some right protected by the Constitution.

Same — presumption that widow was wholly dependent on husband.

3. The provision in the compensation law that the surviving wife shall be conclusively presumed to be wholly dependent upon her husband infringed no constitutional right of the relator and is valid.

Same — wife living apart from husband — evidence.

4. While the evidence shows that plaintiff was living apart from her husband, it fails to show that she was doing so voluntarily.

Same — allowance for last sickness and burial.

5. The evidence justified the allowance made for last sickness and burial.

Same — procedure — attorney's lien.

6. Proceedings under the compensation law are informal and are intended to be inexpensive; and only extraordinary circumstances will justify the allowance of an attorney's lien for any considerable part of the amount awarded.

Upon the relation of London & Lancashire Indemnity Company of America, the supreme court granted its writ of certiorari directed to the

¹Reported in 166 N. W. 772.

district court of Hennepin county and the Honorable John H. Steete, one of the judges thereof, to review the action of that court in proceedings under the Workmen's Compensation Act brought by Lillian Rush, as widow of employee, against relator, as insurer, to recover for the death of her husband. Affirmed.

John F. Bernhagen, for relator.

Henry K. Elder, John C. Benson and R. H. Fryberger, for respondents

TAYLOR, C.

Certiorari to review a judgment of the district court of Hennepin county awarding compensation under the Workmen's Compensation law to Lillian Rush for the death of her husband, John Rush.

- 1. The court found that on January 25, 1917, John Rush received an accidental injury "arising out of and in the course of his employment" which caused his death on March 3, 1917. The relator admits that Rush received the injury and that it arose out of and in the course of his employment, but contends that the evidence is not sufficient to sustain the finding that his death resulted from his injury. He fell and struck. upon his head and was unconscious for a few moments. Two or three days afterward he resumed his duties and performed his work as usual for a week or more when he was discharged. During this period he appeared to be in his normal condition, except that an impediment in his speech seemed to be more pronounced than theretofore. On February 19 he entered a hospital where he died on March 3. The doctor who made an autopsy testified that death resulted from a hemorrhage on the brain of traumatic origin, and that a microscopical examination disclosed "repair cells" which showed that the original injury had been received several weeks previously. We are satisfied that the evidence justified the finding.
- 2. The statute provides that the surviving wife "shall be conclusively presumed to be wholly dependent * * * unless it be shown that she was voluntarily living apart from her husband at the time of his injury or death." Laws 1915, p. 290, c. 209, § 5 (G. S. Supp. 1917, § 8208).

The relator contends that the legislature cannot make the presumption of dependence conclusive, and claims that plaintiff was not in fact

dependent upon her husband for the reason that she had supported herself for years without assistance from him. The legislature, in declaring that a particular fact shall be conclusively presumed, does not establish a presumption in the ordinary sense of the term, but rather a rule of law to the effect that in the case specified the nonexistence of the fact presumed is immaterial. 9 Enc. Ev. 884; 2 Wigmore, Ev. § 1353. The legislature can make a presumption conclusive, unless such presumption would cut off or impair some right given and protected by the Constitution. No provision of the Constitution is cited which takes from the legislature the power to define and prescribe the duties of the husband to his wife and children and the rights to which the wife shall be entitled in consequence of the existence of the marriage status; and we are satisfied that the legislature had power to provide that, for the purposes of the compensation law, the wife "shall be conclusively presumed to be wholly dependent" upon her husband, regardless of whether she had or had not been supported by him in his lifetime. The duty to support her rested upon him as a continuing obligation which could have been enforced at any time. The legislature could recognize the existence of this obligation, and in the plenitude of its power could make such reasonable provision for the wife under the compensation law as it deemed just and proper. Furthermore, even if the constitutional guaranties would be infringed by making the presumption conclusive in other cases, they would not be infringed by making it conclusive under the compensation law, for the provisions of that law are obligatory only upon those who elect to become subject to it, and those who voluntarily assume the liabilities imposed by the law in order to secure the benefits conferred by it have been deprived of no constitutional right. Mathison v. Minneapolis St. Ry. Co. 126 Minn 286, 148 N. W. 71, L. R. A. 1916D, 412; State v. District Court of Hennepin County, 139 Minn. 205, 166 N. W. 185.

This same provision was involved in State v. District Court of Ramsey County, 137 Minn. 283, 163 N. W. 509, but its validity was not challenged. Similar provisions are found in the statutes of several states and their validity seems not to have been questioned. Nelson's Case, 217 Mass. 467, 105 N. E. 357; Finn v. Detroit, Mt. C. & M. C. Ry. Co. 190 Mich. 112, 155 N. W. 721, L. R. A. 1916C, 1142; Northwestern Iron

- Co. v. Industrial Commission, 154 Wis. 97, 142 N. W. 271, L. R. A. 1916A, 366, Ann. Cas. 1915B, 877.
- 3. The relator contends that plaintiff was voluntarily living apart from her husband and is not entitled to the benefit of the conclusive presumption for that reason.

She had lived apart from her husband for about 12 years, but there is no finding that she did so voluntarily, and the evidence does not require such a finding. According to her testimony, which is the only evidence upon the question, he not only threatened her life, but ordered her to leave and drove her away with a gun, and she left and lived apart from him solely because she was in fear of personal violence. This fails to show that she was voluntarily living apart from him within the meaning of the statute. State v. District Court of Ramsey County, 137 Minn. 283, 163 N. W. 509.

- 4. The statute (subd. 16, § 5, c. 209, p. 292, Laws 1915, [G. S. Supp. 1917, § 8208]), provides that the employer shall pay "the expense of last sickness and burial, not exceeding in amount one hundred (\$100.00) dollars," except in certain cases not here material. As the evidence shows that such expenses exceeded \$100 we find no error in the allowance of that amount therefor.
- 5. The court allowed plaintiff's attorneys a lien in the sum of \$400 upon the amount recovered. The relator raises no question concerning this lien, except to call attention to the fact that if plaintiff is not entitled to recover her attorneys are not entitled to a lien as against the relator. The amount for which the lien is allowed in this case is not questioned by anyone and hence is not before us for consideration, but we wish to call attention to the fact that the proceedings under this law are informal and summary and are intended to be inexpensive; and that only extraordinary circumstances will justify the court in allowing a lien for any considerable proportion of the compensation awarded the dependent.

Judgment affirmed.

GEORGE D. SNIDER AND ANOTHER v. PETERS HOME BUILDING COMPANY.¹

March 22, 1918.

No. 20,653.

Building contract — action for breach — finding of substantial performance.

1. The evidence in an action by the owners against the contractor for the breach of a contract to build a house was such as to sustain though not to require a finding that the defendant substantially performed and that such defects as there were could be readily remedied by a reasonable expenditure so that the plaintiffs would then have the house for which they contracted.

Same — defects readily remedied — measure of damages.

2. In such a case the measure of damages is the reasonable cost of remedying such defects and not the difference in value between the house as it was as it should have been; and it was error to exclude from the jury the cost of remedying defects.

Action in the district court for Hennepin county to recover \$1,500 for breach of a building contract. The answer alleged that the house in question was build in accordance with the contract; that it was substantially completed, accepted and occupied by plaintiffs in September, 1915, and that they have ever since occupied it. The case was tried before Leary, J., who denied defendant's motion for a directed verdict, and a jury which returned a verdict for \$450. Defendant's motion for judgment notwithstanding the verdict or for a new trial was denied. From the order denying its motion for a new trial, defendant appealed. Reversed.

James C. Melville, for appellant. Daniel F. Foley, for respondent.

¹Reported in 167 N. W. 108.

- DIBELL, C.

The plaintiffs had a verdict for \$450 in an action to recover damages for the failure of the defendant to construct a house in accordance with the contract between them. The defendant appeals from the order denying its motion for a new trial.

The defendant contracted to construct the house for \$2,600 in accordance with plans agreed upon. It constructed one in assumed compliance with the contract and the plaintiffs took possession. They claim it was not constructed in accordance with the plans and that it was defective in respect of workmanship and materials. The court instructed the jury that the measure of the plaintiffs' damages, if they were entitled to recover at all, was the difference in value between the house as it was and as it would have been if constructed according to contract. Nothing was said about the effect of a performance so substantial that such defects as there were could be readily remedied by a reasonable expenditure so that the plaintiffs would then have the house for which they contracted, though there was some evidence that the cost of remedying defects would be slight.

The questions necessary to discuss are these:

- (1) Whether the evidence was such as to sustain a finding that there was a substantial performance of the character indicated and therefore to require the submission of the question to the jury.
- (2) If so, and if the jury found such substantial performance, whether the measure of damages was the cost of remedying defects or the difference in the value of the house as it was and its value as it should have been.
- 1. The evidence for the plaintiffs and for the defendant was directly opposed. That for the plaintiffs was to the effect that there were defects in material and workmanship so vital and which so permeated the structure that a reasonable outlay would not remedy them and give the house which the defendant contracted to build. The defendant's evidence is to the effect that there was at the least a substantial performance, that such defects as there were could be remedied by an expenditure of \$25 or \$30, and that the plaintiffs would then have the house for which they contracted. Whether there is substantial performance is usually a question of fact. Brown v. Hall, 121 Minn. 61,

140 N. W. 128; Elliott v. Caldwell, 43 Minn. 357, 45 N. W. 845, 9 L.R.A. 52. We cannot say that it conclusively appears there was not a substantial performance, though the evidence that the construction, both in respect of workmanship and material, was shabby and inherently bad is quite sufficient to sustain a finding that the performance was not substantial. The question was for the jury.

We have not overlooked the plaintiffs' claim, urgently pressed, that one bedroom was smaller than that for which the plans called, and that because of this alone there was not a substantial performance. The facts are these: The plans did not call for a soil pipe. The ordinance required one and it is conceded that there should be one. The defendant put one in the partition between the bedroom and the bathroom, and it is conceded that this was a proper place for it. To accommodate it it was necessary to make a jog of a few inches either in the bedroom or the bathroom. The defendant made it in the bedroom. It was largely a question of judgment where it should be. The plaintiffs knew what was being done and made no substantial objection. We cannot sustain the plaintiffs' contention in this respect.

We hold that the evidence was sufficient to require a submission of the question of substantial performance.

'2. The remaining question is whether the court should have submitted as a measure of damages the cost of remedying defects.

It is the law of this state that the builder who has in good faith substantially performed, though there are minor defects, if they are of a character which may be so remedied that the owner will have that for which he contracted, may recover on the contract the agreed price less such sum as will cure the defects. Leeds v. Little, 42 Minn. 414, 44 N. W. 309; Elliott v. Caldwell, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 53; Lindquist v. Young, 119 Minn. 219, 138 N. W. 28; 1 Dunnell, Minn. Dig. and 1916 Supp. § 1850. The rule which permits a recovery of the contract price with appropriate deductions is applicable only when there has been a good-faith effort to perform and the defects are capable of reasonable remedy so that the owner when they are remedied will have that for which he contracted. The case before us is not one where the contractor sues for the contract price. He has been paid, the owner is not in position to reject the building, and his only remedy is a suit for

damages. Special considerations not present here induced the rule that the builder who has substantially performed may recover on his contract by submitting to such deductions as will make the owner whole. Still a similar principle determines the measure of damages in both cases. Compensation is the basis; and the cases either directly apply or distinctly recognize the correct doctrine to be that the cost of remedying defects when performance is substantial is the proper measure. Gutov v. Clark, 190 Mich. 381, 157 N. W. 49; Graves v. Allert, 104 Tex. 614, 142 S. W. 869, 39 L. R. A. (N. S.) 591; Haysler v. Owen, 61 Mo. 270; Ekstrand v. Barth, 41 Wash. 321, 83 Pac. 305; Thomas v. Warrenburg, 92 Kan. 576, 141 Pac. 255; Trunk v. Clark, 163 Iowa, 620, 145 N. W. 277. This measure makes the owner whole. Often it is the only measure that does. It is equitable.

The effect of the charge was to exclude from the jury the fact, which it might have found, that the defects were of a character readily remedied and the performance substantial, and to eliminate from its consideration the measure of damages based upon the reasonable cost of remedying defects. The distinction between the two measures is not merely verbal nor is a consideration of them a quarrel over words. The difference in value, when the performance is substantial, may in a proper sense be the cost of remedying defects, but this is not the same as the difference in value when there has not been a substantial performance. The jury was not permitted to consider the fact of substantial performance and the cost of remedying, as to which there was evidence, and was confined to the difference in value, as to which also there was evidence, and this was based upon the fact that there was not substantial performance. The court clearly presented the case to the jury, and the verdict is one which would be sustained if the jury had had before it in some proper form the alternative measure of recovery. We are obliged to hold that it should have been submitted.

Order reversed.

THOMAS F. HUGHES v. GLOBE INDEMNITY COMPANY.1

March 22, 1918.

No. 20,713.

Principal and surety - change in condition of bond not retroactive.

1. A bond given by a dealer in live stock was conditioned that he should pay for each lot of stock purchased within 48 hours after delivery. After the bond had been for some time in force the obligee requested and defendant consented that it be changed to provide for payment within two weeks after delivery. Held, this change was not retroactive and the bond did not secure money due from sales made during the two weeks' period prior to the change.

Same - condition as to giving notice of default valid.

2. A provision in such a bond requiring notice within 12 hours after a default is valid. Where such notice is not given the surety is not liable.

Same - Sunday not to be counted.

3. Under the terms of the bond, no recovery can be had on account of a sale made while the dealer is in default more than 48 hours on previous sales. If the 48-hour period ends on Sunday, that day is not to be counted.

Action on bond - pleading and proof - default matter of defense.

4. Proof that such a default existed at the time of any sale is matter of defense. Plaintiff need not in the first instance negative such a default.

Action in the district court for Dakota county by the secretary of the South St. Paul Live Stock Exchange for the benefit of the creditors of Bovey & Humphreys to recover \$5,000 upon defendant's bond. The facts are stated in the opinion. The case was tried before Converse, J., who made findings and as conclusions of law found that the proposed change in the bond did not have any binding force between the parties until the letter of Walter T. Lemon Company, consenting thereto, was mailed in St. Paul on January 10, 1916, and that from the time of such

¹Reported in 166 N. W. 1075. 189 M.—27

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mailing it covered only purchases subsequently made, and ordered judgment in favor of defendant. From so much of an order as denied his motion to amend the findings and conclusions or for a new trial, plaintiff appealed. Reversed.

Moore, Oppenheimer & Peterson, for appellant. Morphy, Bradford & Cummins, for respondent.

HALLAM, J.

Bovey & Humphreys were live stock dealers at South St. Paul. They bought of members of the South St. Paul Live Stock Exchange. It was a rule of the exchange that dealers should settle in cash for all sales within 48 hours. Bovey & Humphreys gave a bond with defendant as surety to the secretary of the exchange for the benefit of all members of the exchange, conditioned that they should "make full payment * * * for each lot of live stock purchased, within forty-eight (48) hours after delivery thereof."

In 1915, the rules of the exchange were changed so as to require dealers to pay for stock only within two weeks after delivery. On November 19, 1915, the secretary of the exchange wrote defendant's agent, asking that its bond be changed to provide that "if the * * * principal shall make full payment * * * for each lot of live stock so purchased within two (2) weeks after the delivery thereof * * * then this bond to be void, otherwise of full force and effect."

After some negotiation, defendant's agent, on January 10, 1916, wrote the secretary that "The Globe Indemnity Company hereby agrees to this change in the bond."

On January 11, Bovey & Humphreys failed, owing some members of the exchange for purchases made during the preceding two weeks Plaintiff sued on the bond. The court found for defendant and plaintiff appealed.

1. The first question is, Did the agreed change in the bond become operative so as to cover sales of stock made during the whole two weeks' period prior to January 10? We do not think it should be so construed.

If a new bond had been written, it would not have covered obligations incurred but not matured at the date it became operative. See Bartlett v. Wheeler, 195 Ill. 445, 443, 63 N. E. 169; Dorsey v. Fidelity

& Casualty Co. 98 Ga. 456, 25 S. E. 521; Union Cent. Life Ins. Co. v. Skipper, 115 Fed. 69, 52 C. C. A. 663; Sinclair & Co. v. National Surety Co. 132 Iowa, 549, 560, 107 N. W. 184.

Neither should a change in the bond be given a retroactive effect, unless the intent that it shall so operate affirmatively appears. We find nothing indicative of such intent.

2. The bond was, at all times up to January 10, operative according to its original terms. Defendant does not claim otherwise. Some members of the exchange had claims for stock sold January 7, and on earlier days. These claims became in default 48 hours thereafter. The second section of the bond provided: "That the surety shall not be liable for any default * * * unless within twelve (12) hours from the time of such default, telegraphic notice of said default addressed to it at its home office, be left at some telegraphic office for transmission to it, or unless within such twelve (12) hours the person in charge of its office in St. Paul be personally notified of such default." The parties agreed to the provision. It is a valid one. See Grant v. North American Casualty Co. 88 Minn. 397, 93 N. W. 312; Sullivan v. Fraternal Societies' Co-op. Indemnity Union, 73 N. Y. Supp. 1094; Rorick v. Railway O. & E. Acc. Assn. 119 Fed. 63, 55 C. C. A. 369; Missouri Pac. Ry. Co. v. Western Assur. Co. 129 Fed. 610.

No notice of default was given until the evening of January 11. This notice was too late as to purchases made January 7 or earlier and no claim on the bond exists because of these purchases.

3. Money is due some members for purchases made January 10. The court found in effect that none of these were made after the consent to the change in the bond. The original bond was therefore in force when these purchases were made. The notice was timely as to these.

Another question is, however, involved. By section 6 of the bond, the surety is not liable on account of purchases made "if at the time of such purchase there shall be due to such member from the principal any sum on account of any previous purchase of live stock purchased more than forty-eight (48) hours prior thereto." This provision was without doubt violated by every member having a claim for sales made on the tenth, except in two instances. F. S. Page & Company and C. L. Kaye hold claims for sales made January 10 and had prior claims

only for sales made on January 7. January 9 was Sunday. If Sunday is to be counted in the computation of the period of 48 hours, the debts of the seventh became in default on Sunday and the sales made on Monday, the tenth, were necessarily made after default.

We think Sunday is not to be counted. Where the last day for performance of an act falls on Sunday, the general rule at common law is that Sunday is excluded and parties have until the next day to perform. Street v. United States, 133 U. S. 299, 10 Sup. Ct. 309, 33 L. ed. 631; Bowles v. Brauer, 89 Va. 466, 16 S. E. 356; State v. Green, 66 Mo. 631; Thayer v. Felt, 4 Pick. (Mass.) 354.

Some cases hold that, where the period is of hours instead of days, the hours of Sunday are to be counted. Casey v. Viall, 17 R. I. 348, 21 Atl. 911; Flagg v. Inhabitants of Millbury, 4 Cush. (Mass.) 243.

Two reasons forbid the application of such a rule here: First, in all cases of contract, the intent of the parties, where it can be ascertained, controls. Meng v. Winkleman, 43 Wis. 41. Surely the parties to this bond did not intend that these South St. Paul dealers should be on hand on Sunday to make and receive payments for Friday's purchases and to give notice to defendant in case of default. See Penniman v. Cole, 8 Metc. (Mass.) 496.

Second, the statutes seem to cover the case. Section 6010 provides that: "Bills of exchange, promissory notes, and other contracts payable or to be performed on Sunday * * * shall be payable or performable on the next succeeding business day," and section 9412, subd. 21, provides that, in computing the time within which an act is to be done, when the last day falls on Sunday, "the prescribed time shall be extended so as to include the first business day thereafter." We see no reason to hold that these statutes do not apply to a computation of a period of 48 hours. We hold that the 48 hour period from the time of the purchases on Friday, January 7, expired at the same hour on Monday, January 10.

4. Whether Friday's purchases were more than 48 hours old at the time of the sales on Monday, became then a question of hours. There is no evidence as to the hour of any sales. If the burden is on plaintiff to prove the negative, that no sales were made more than 48 hours before, he has failed and the decision in favor of defendant

was right. If proof that such default existed at the time of Monday's sales, is defensive matter, then defendant has failed in its defense as to these items. We think such proof is matter of defense.

Had plaintiff simply pleaded and proved the purchase on Monday, the nonpayment, and the notice to defendant, he would have made out a case. Surely he was not obliged to prove as a condition precedent that the terms of the bond had not been broken by the existence of prior defaults. See Ibs v. Hartford Life Ins. Co. 119 Minn. 113, 137 N. W. 289; Zalesky v. Fidelity & Casualty Co. of New York, 176 Iowa, 267, 157 N. W. 858; Van Arsdale-Osborne Brokerage Co. v. Riner, 51 Okl.—, 153 Pac. 859.

Defendant alleged such prior default. There are some decisions to the effect that this enlarged plaintiff's burden of proof and imposed on him the burden of disproving a breach in that particular. Koppitz-Melchers Brewing Co. v. Schultz, 68 Oh. St. 407, 67 N. E. 719: Johnson v. Mercantile Town Mut. Fire Ins. Co. 120 Mo. App. 80, 96 S. W. 697. We cannot follow these decisions. They seem to us out of harmony with well recognized principles of pleading and evidence. What defendant was obliged to plead it was obliged to prove. Brown v. Farnham, 58 Minn. 499, 60 N. W. 344; Randahl v. Lindholm, 86 Minn. 16, 89 N. W. 1129. A new trial should be had on the question whether the sales mentioned were made after default.

In justice to the trial judge, it should be said that the fact that January 9 was Sunday, does not seem to have been called to his attention. We must, however, take judicial notice of the fact, and the question of the effect of it is presented by this appeal.

Order reversed and new trial granted as to the issue above mentioned.

JACOB HAEISSIG v. MICHAEL DECKER.1

March 22, 1918.

No. 20,731.

Evidence — when objection is too late.

1. A party cannot complain of the reception, a second time, of evidence which he has once admitted without objection.

Seduction - charge to jury proper.

2. In an action by a father for damages for seduction of his daughter, it is proper to instruct the jury that if the daughter had at some time in her life been unchaste, but at the time of the alleged seduction she had reformed and had actually acquired the virtue of chastity, she was then a woman of previous chaste character. The evidence justified this instruction in this case.

Same — damages not excessive.

3. The damages are not excessive.

Action in the district court for Winona county to recover \$5,000 for seduction. The case was tried before Granger, J., and a jury which returned a verdict for \$1,500. From an order denying defendant's motion for a new trial, he appealed. Affirmed.

Tawney, Smith & Tawney and Henry M. Lamberton, for appellant. Webber & Lees and C. A. Spencer, for respondent.

HALLAM, J.

This is an action to recover damages for seduction of plaintiff's daughter 22 years old. Plaintiff and defendant are both farmers living in Winona county. The act was alleged to have been committed in February, 1916. The verdict was for plaintiff. The evidence is in conflict, but it is sufficient to sustain the verdict.

1. Defendant called a witness to prove that defendant's reputation for chastity was good. On cross-examination of this witness and later by cross-examination of defendant himself, plaintiff was permitted to offer

¹Reported in 166 N. W. 1085.

proof that defendant, in November, 1916, married another woman, and that in March, 1917, she gave birth to a child. This is assigned as error. This objection is disposed of by the fact that, at the very outset of the case, substantially the same evidence was received without objection. At this point, defendant testified that he was married in November, 1916, and at the date of the trial, April 25, 1917, he was living on a farm with his wife and child.

The suggestion that this child may have been a child by a former marriage does not explain. The testimony in the case does not permit an inference that he was ever married before. Nor could it fairly be inferred that the child was the child of a man other than defendant.

Clearly defendant cannot complain of the reception a second time of evidence which he has once admitted without objection.

2. There was evidence that in 1912 plaintiff's daughter had illicit relations with a man other than defendant. The evidence was denied. The court charged the jury: "Even though you should find that the daughter had at some time in her life been unchaste, but, at the time of the intercourse with the defendant, she had reformed and actually acquired the virtue of chastity, she was then a woman of previous chaste character * * * for the law gives her an opportunity to repent and reform, and if that repentance is sincere and the reformation actual, she is then, in the eyes of the law at least, again a virtuous woman." The charge states a proposition that in the abstract is recognized as correct in law and morals. State v. Preuss, 112 Minn. 108, 127 N. W. 438. Seduction presupposes chastity, but it would not do to hold that chastity once lost can never be regained.

Defendant argues that there is no evidence that she had ever reformed. True, there is no direct evidence to that effect, for she denied altogether the alleged delinquency. But if the jury believed defendant's witnesses on this point we think there was evidence from which they might also find that she had reformed. For more than three years prior to the alleged seduction she had been living the life of the respectable young people of that community. She was received into their social circle and was part of their social activities. Her reputation was good enough so that defendant associated much with her, and, according to evidence of plaintiff's witnesses, promised to marry her. We think the jury

might find that, whatever her lapses in 1912, she was, in 1916, living a virtuous life.

3. The verdict was for \$1,500. The court charged the jury that in assessing damages they might take into consideration the loss of the services of the daughter, the expenses connected with her confinement, the plaintiff's wounded feelings and mental anxiety, and the dishonor to the plaintiff and his family, and this was right. Hein v. Holdridge, 78 Minn. 468, 81 N. W. 522. The damages are large. Plaintiff's pecuniary loss was small. His mental anguish would sustain substantial damages. The sting of disgrace was keen. And the case was one for punitive damages. Hein v. Holdridge, supra. The daughter's claim is that defendant encompassed her ruin through a promise of marriage. The consequences bear heavily upon defendant, but so they should. If the evidence on behalf of plaintiff is to be believed, defendant estimated much too lightly the sacredness of feminine honor.

Order affirmed.

R. A. KROMER v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY.

March 22, 1918.

No. 20,747.

Master and servant - inspection of simple tools by master.

1. The rule that no duty rests upon an employer to inspect simple and common tools to discover defects which arise from the ordinary use of such instruments, followed.

Same — steel wrench in use for two years.

2. The rule applies to a steel wrench furnished by the master, which was in good condition when furnished to the employee, and which had been used by the plaintiff, a skilled machinist, in a roundhouse for over two years.

Action in the district court for Pennington county to recover \$15,000 for injuries received while in defendant's employ. The answer alleged 1Reported in 166 N. W. 1072.

the injury was caused by plaintiff's negligence and was due to risks which he had knowingly assumed. The case was tried before Grindeland, J., who denied motions for directed verdicts and a jury which returned a verdict for \$1,000. Defendant's motion for judgment notwithstanding the verdict was denied. From the judgment entered pursuant to the order for judgment, defendant appealed. Reversed.

John L. Erdall, E. M. Stanton and Charles Loring, for appellant. Charles E. Boughton, for respondent.

QUINN, J.

This action is brought to recover damages for injury claimed to have been sustained by the plaintiff while in the employ of the defendant as a machinist. A trial was had in June, 1917, resulting in a verdict for the plaintiff in the sum of \$1,000. The defendant moved, upon a settled case, for judgment in its favor notwithstanding the verdict, which was refused. From a judgment thereafter entered against it, the defendant appealed.

The plaintiff is a skilled machinist, and for about 12 years had been employed in repairing locomotives for railroad companies. During the 3 years prior to his injury he was in the employ of the defendant, repairing locomotives in its roundhouse at Thief River Falls. January, 1916, he was directed by the foreman to repair a certain locomotive which had a loose crosshead pin. He then requested his helper to bring the wrench for the crosshead. The tool referred to is a hexagon wrench made of heavy steel, is about 4 feet in length, weighs about 20 pounds and is used for the one purpose. On the outer end of the crosshead pin are 2 six-sided burrs about 4 inches in diameter. In making the repair, it was necessary to loosen the outer burr, which turns very hard. The helper brought the wrench, placed it on the burr, plaintiff took hold of the wrench, with the helper, and they gave it a hard pull for the purpose of loosening the burr. The wrench slipped off, the handle striking plaintiff's elbow, or crazy bone, on the right arm. The blow made his arm numb, and it remained lame for a number of days. About 4 weeks later he noticed that his right arm trembled, but he continued to work until April when he quit the employ of the defendant.

There is no dispute but that the tremor had gradually grown worse until, at the time of the trial, it affected the whole of the right arm, the muscles of the chest and the right leg, and he was suffering with what is known as paralysis agitans, or trembling palsy, which is incurable.

The plaintiff's claim is, that the disease which he has was induced or caused by the injury to his elbow, and that the injury was the result of the use of a defective and improper tool furnished him by the defendant with which to repair the locomotive referred to, the defect being that the wrench used was improperly constructed, in that it had an unnecessary offset in the handle which gave it a tendency to turn and slip off the burr when in use, and that the grasping part of the wrench had become worn and beveled, of which he had no knowledge, which also tended to cause the wrench to slip off the burr when in use.

It is the claim on the part of the defendant that the wrench was in proper repair when placed in the roundhouse for use some 3 years prior to the time of the alleged injury; that it was used but for one purpose and was the only one of its kind in the roundhouse, and when not in use it was kept in an open rack; that there were about 12 locomotives that entered this roundhouse for repairs; that there were some 5 or 6 skilled mechanics employed therein, including the plaintiff, whose duty it was to repair the locomotives; that it had always been the custom of the skilled workmen using the tools therein to take the same to the roundhouse blacksmith when necessary, and have them repaired; that the repair of crosshead pins was an almost daily occurrence, and that the wrench in question had been used almost daily by the machinists, including the plaintiff, for more than 2 years at the time of the alleged injury. About these contentions there seems to be no controversy. The defendant further claims that there was no person employed in the roundhouse charged with the duty of inspecting tools used by the skilled mechanics, but that it was the duty of such mechanics to see that the tools which they used were in repair before using the same; that the plaintiff assumed the risk of the injury alleged to have been sustained; that the wrench in question was a simple tool with no mechanism about it, and required no special skill in its construction or use; that the evidence fails to establish negligence on the part of the defendant, and that it does not appear that the disease from which the plaintiff is suffering was caused or brought about by the injury complained of.

It is argued that it was the duty of the defendant not only to furnish to the plaintiff a reasonably safe tool with which to work, but also to inspect the same from time to time while it was being used and remedy any defects which might be found to exist therein. It is too well settled to require a citation of authorities that: "When the appliances or machinery furnished employees are at all complicated in character or construction, the employer is charged with the duty of making such reasonable inspection as is necessary to detect defects. But the master is under no duty to inspect simple or common tools, or to discover or remedy defects arising necessarily from the ordinary use of such instruments." Koschman v. Ash, 98 Minn. 312, 108 N. W. 514, 116 Am. St. 373, and cases therein cited.

Under the rule, no liability rests on the master for the ordinary perils resulting from the use of common, simple tools, nor for those latent and usual defects or weaknesses, which, by reason of the character of the appliance, are presumed to be known to all men alike.

In the instant case, the wrench used was made from a flat piece of steel. The head, or grasping part, had a flat face, was about 3/4 of an inch thick, 6 inches in diameter, with a hexagonal hole through the center to fit the burr on the crosshead pin. In the handle about 4 inches from the grasp was an offset of about one inch. In loosening the burr on a crosshead pin the wrench is used in much the same manner as an ordinary iron wrench in loosening a burr to remove a wheel from a carriage. It is just as simple, the difference being in the size of the wrench, which does not, under the authorities, take it out of the category of simple tools. Koschman v. Ash, supra. The tool was simpler than an ordinary monkey wrench, which is classed as a simple tool. Stork v. Charles Stolper Cooperage Co. 127 Wis. 318, 106 N. W. 841, 7 Ann. Cas. 339. The wrench being a simple tool, the servant using the same is deemed to have assumed all the risk incident to its use.

It is clear that the plaintiff was perfectly familiar with the particular tool in question. He was a skilled mechanic, had used the wrench almost daily for over two years. The defects consisted of the worn and beveled edge of the grasping part of the wrench, open and visible. If the plaintiff had looked at the face of the wrench, he could have hardly avoided observing the defect. It was plaintiff's duty to inspect the

wrench and have it repaired if he found it in bad condition. Wachsmuth v. Shaw Electric Crane Co. 118 Mich. 275, 76 N. W. 497.

The plaintiff having assumed the risk incident to the use of the tool in question, and the defendant being without negligence, it becomes unnecessary to consider the other questions involved.

Judgment reversed.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY v. SAMUEL S. GREENBERG.¹

March 22, 1918.

No. 20,757.

Action for balance due on interstate shipment — no estoppel against carrier — presumption.

1. In an action by a railroad company to recover a balance of the legal freight upon an interstate shipment from the consignee, who had accepted the shipment, paid the amount of the freight erroneously understated in the bill of lading, and settled with the consignor upon that basis, the defense of estoppel is not available, for the consignee is conclusively presumed to have had knowledge of the published legal rate.

Same - implied contract by consignee to pay balance, when.

2. The consignor or shipper is primarily liable to the carrier for the freight. But if the consignee, the presumed owner, accepts an interstate shipment and pays part of the freight, the law implies an agreement on his part to pay the balance to the carrier, where, as here, the carrier, at the time of the delivery of the shipment, has no knowledge of the arrangement between the consignor and consignee as to the payment of the freight, and the consignor then is and ever since has been insolvent.

Action in the municipal court of St. Paul to recover \$30.68, balance due upon a shipment of scrap iron. The facts are stated in the opinion. The case was tried before Boerner, J., who made findings and ordered judgment in favor of defendant. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Reversed.

F. W. Root and Nelson J. Wilcox, for appellant. Moore, Oppenheimer & Peterson, for respondent.

¹Reported in 166 N. W. 1073.

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HOLT, J.

In November, 1909, defendant, doing business under the name of Greenberg Iron & Metal Company, purchased from J. Applebaum at Cogswell, North Dakota, three carloads of scrap iron to be delivered f. o. b. in St. Paul, Minnesota. The iron was delivered by J. Applebaum to plaintiff, a common carrier of interstate commerce, at Cogswell for shipment to defendant at St. Paul. Plaintiff issued its bill of lading, naming defendant as consignee, but erroneously stating the freight charge to be \$166.26, whereas by the duly published schedule rate the amount was The defendant accepted the shipment and paid the freight to the amount stated in the bill of lading. Later, the error being discovered, this action was brought to recover from the consignee the balance of the legal rate. The defense is that defendant purchased the iron as above stated, and, upon its arrival at St. Paul, paid the freight named in the bill of lading, relying on its being the correct amount, and also in reliance thereon paid the balance of the purchase price to Applebaum, who ever since has been and now is wholly insolvent. In short, the defense is that because of the carelessness in misstating the freight charges in the bill of lading, whereby defendant was misled into settling with Applebaum upon the basis of its correctness, plaintiff is now estopped from holding defendant for the under charge. There is no allegation or finding to the effect that plaintiff had any knowledge of the sale of the iron or the terms of the sale. The trial court directed judgment in favor of defendant; from the judgment so entered plaintiff appeals.

The facts as above stated are admitted by the pleadings and stipulation of the parties; and the correctness of the conclusion of law in the findings is the only question before us.

It seems impossible to raise the defense of estoppel here. Under authoritative rulings defendant is conclusively presumed to have been cognizant of the proper legal rate, and hence must be held to have known that the payment made was but partial and that plaintiff was bound to collect the balance or be penalized. Kansas City Southern Ry. Co. v. Carl, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. ed. 683. Therefore an essential factor in estoppel, namely, that the one invoking the doctrine for protection did not know the true situation, is here lacking. In Central of Georgia Ry. Co v. Birmingham S. & B. Co. 9 Ala. App. 419,

64 South. 202, after citing a number of decisions to the effect that the consignee as well as the carrier must be held to have knowledge of the duly published interstate freight rates, is is said that the carrier cannot in any way estop itself from exacting the legal rate. Estoppel cannot avail against the recovery of the legal interstate commerce rates. New York, N. H. & H. R. Co. v. York & Whitney Co. 215 Mass. 36, 102 N. E. 366, and cases therein cited. This is virtually our previous holding in W. C. Goodnow Coal Co. v. Northern Pacific Ry. Co. 136 Minn. 420, 162 N. W. 519. It therefore remains to determine whether plaintiff can maintain this action against defendant had there been no mistake in the bill of lading and had the shipment been delivered to him without any payment of freight and without any express contract in respect to such payment.

Primarily the consignor, Applebaum, who made the contract of shipment, was liable to the carrier for the freight charges. 10 C. J. p. 445. But the owner, or the one having an interest in the property transported, is also obligated to compensate the carrier. 10 C. J. p. 446, and cases there cited. Prima facie the consignee is the owner. 1 Dunnell, Minn. Dig. § 1341, 2 Hutchinson, Cariers (3d ed.) § 807. There is nothing in this case to show that plaintiff knew that Applebaum had sold the iron f. o. b. St. Paul, or that he made the shipment in any other capacity than as agent for the consignee, the presumptive owner. However that may be, when defendant received the shipment, he received it as the actual owner and under the authorities he then became obligated for the whole freight charge. He paid part of it, and the law implies an agreement to pay the balance lawfully due. As said in Pennsylvania R. Co. v. Titus, 216 N. Y. 17, 109 N. E. 857, L.R.A. 1916E, 1127, Ann. Cas. 1917C, 862 (where the consignee was merely a factor for the consignor): "In accepting and receiving the goods he (the consignee) made himself a party to the contract between the consignor and the plaintiff, or entered into an original contract to pay, which took the place of the right of the plaintiff to retain the property until the charges were paid." The shipment there being interstate commerce, the court held that the consignor, consignee and carrier were alike charged with full knowledge of the published rate and its inescapable force, and it was the rate which the defendant agreed to pay in accepting the goods; therefore the payment of a part obviously did not release the consignee from paying the balance. To the same effect is Union Pac. Ry. Co. v. American S. & R. Co. 202 Fed. 720, 121 C. C. A. 182; Yazoo & M. V. Ry. Co. v. Zemurray, 238 Fed. 789, 151 C. C. A. 639; Central of Georgia Ry. Co. v. Birmingham S. & B. Co. supra; Cornelius v. Central of Georgia Ry. Co. 13 Ala. App. 533, 69 South. 331; New York, N. H. & H. R. Co. v. York & Whitney Co. supra.

Defendant relies upon Central R. Co. v. MacCartney, 68 N. J. Law, 165, 52 Atl. 575, and Central of Georgia Rv. Co. v. Southern F. C. Co. 193 Ala. 108, 68 South, 981, Ann. Cas. 1916E, 376. In the first case there was an error made by the plaintiff railway company in the lighterage charge, concerning which, as we understand, there was no published legal rate; hence the consignees, the purchasers of the goods carried, were not chargeable in law with knowledge of the correct amount, and payment of the named freight charges and settlement with the consignor, a foreign corporation, for the purchase price, after deducting such charges, in ignorance of the error, placed them in a position to invoke the estoppel which the decision sustained. In that case it is also stated that the carrier had actual notice that the ownership of the shipment was in the consignor until delivery to the consignee. The decision also recognizes the rule that acceptance of the shipment by the consignee without payment of the full freight charge, implies an agreement on his part to pay any balance remaining. Such implied agreement, however, does not discharge the shipper from his obligation to the carrier, the two contracts being independent but not inconsistent.

In Emerson v. Central of Georgia Ry. Co. 196 Ala. 280, 72 South. 120, L.R.A. 1916F, 120, the same justice who wrote the decision in Central of Georgia Ry. Co. v. Southern F. C. Co. supra, points to certain features that distinguish the latter case from the one at bar, namely, that, when the claim there was made for undercharge of freight, the carrier was informed of the true contract between the consignee and consignors under which the latter, who were entirely solvent, were obligated to pay the freight. The very opposite of which is the situation before us.

The case of Coal & C. Ry. Co. v. Buckhannon R. C. & C. Co. 77 W. Va. 309, 87 S. E. 376, L.R.A. 1917A, 663, cited by defendant to the effect

that a consignor is bound to the carrier for the freight, although the title to the goods passed to the consignee upon delivery to the carrier, also supports plaintiff's right of recovery here, for part of the syllabus is: "In the absence of a special contract, both consignor and consignee, who has accepted the goods, are liable to the carrier." In New York Cent. & H. Ry. Co. v. Butler (Sup.) 145 N. Y. Supp. 918, the defendant was not consignee, but was named as a person to be notified of the arrival of the shipment at destination, and the case does not seem to be in point here.

In our opinion the conclusion of law should be amended so as to direct judgment in favor of plaintiff.

The judgment is reversed and the case remanded for the final disposition indicated.

STONE-ORDEAN-WELLS COMPANY v. C. H. TAYLOR.1

March 22, 1918.

No. 20, 760.

Principal and surety — surety's right on a continuing guaranty.

1. A surety on a continuing guaranty has a right to stand on the precise terms of his contract. He can be held to no other or different contract.

Same — discharge of one surety a release of the others, as to future liability.

2. The discharge of one of the cosureties on a continuing guaranty, affects the contract as to all, and amounts to a release of the other cosureties for liabilities subsequently incurred.

Action in the district court for St. Louis county to recover \$2,517.76 upon a letter of credit. The answer alleged that on or about June 21, 1907, defendant and F. B. Myers entered into a written agreement with plaintiff wherein they jointly agreed to guarantee the payment of the account of the Aurora Mercantile Company; that thereafter Myers and plaintiff without knowledge or consent of defendant entered into

¹Reported in 166 N. W. 1069.

in agreement whereby said F. B. Myers was released from the guarantee. The case was tried before Fesler, J., who made findings and as conclusion of law ordered judgment in favor of plaintiff for \$1,935.18. From an order denying its motion to amend the conclusions of law or for a new trial, defendant appealed. Reversed.

Oliver S. Andresen and Fryberger, Fulton & Spear, for appellant. Courtney & Courtney, for respondent.

QUINN, J.

Plaintiff is a corporation engaged in the wholesale mercantile business at Duluth in this state. The Aurora Mercantile Company is also a corporation engaged in the retail mercantile business at Aurora, about 100 miles distant from Duluth. In June, 1907, the Aurora Company was indebted to the plaintiff for merchandise in the sum of \$6,097.18. The defendant, C. H. Taylor, and one F. B. Myers, both stockholders and officers in the Aurora Company, signed and delivered to plaintiff, who accepted the same, a letter of credit, a copy of which is as follows:

June 21st, 1907.

Stone-Ordean-Wells Co., Duluth, Minnesota.

Gentlemen:

In consideration of the sum of one (\$1.00) to me in hand paid, receipt whereof is hereby acknowledged, and the further extension of credit granted by Stone-Ordean-Wells Co. to Aurora Mercantile Co., I hereby unconditionally guarantee payment of whatever amount said Aurora Mercantile Co. shall at any time be owing to said Stone-Ordean-Wells Co., on account of goods heretofore or hereafter sold, whether said indebtedness is in the form of notes, bills or open account. This shall be an open and continuing guaranty and shall continue in force notwithstanding any change in the form of such indebtedness, or renewals or extensions granted by you, without obtaining my consent thereto, and until expressly revoked by written notice from me to you, and any such revocation shall not in any manner affect my liability as to any indebtedness contracted prior thereto.

Notice of indebtedness and of default in payment are hereby waived.

139 M.—28



Liability under this guaranty shall at no one time exceed the sum of \$6,097.53.

Witness:

C. H. Taylor,F. B. Myers.

The above guaranty was executed by Taylor and Myers, and accepted by plaintiff at its place of business in Duluth. Myers was a banker residing at Biwabik. Taylor lived at Duluth and was engaged in the book and stationery business. Neither had active charge of the affairs of the Aurora Company. Myers disposed of his interest in the Aurora Company, and on February 8, 1908, wrote the plaintiff as follows: Gentlemen:

Some time ago, with Mr. C. H. Taylor, I signed a personal guarantee, guaranteeing the accounts of the Virginia Store Company, the Aurora Mercantile Company, and also, I think, the R. J. McGhee Company. At this time I wish to rescind the guarantee on my part.

Hereafter, from this date you are notified that I will not be responsible for any accounts that they may assume, as per my guarantee.

Kindly acknowledge receipt of this favor, and oblige,

Yours truly,

F. B. Myers.

To which the plaintiff replied:2

Dear Sir:

We beg to acknowledge receipt of your favor of the 16th instant, notifying us of your intention to countermand the guarantee of the account of the Virginia Store Company and the Aurora Mercantile Company. Of course you understand that your guarantee holds on all accounts contracted up to this date.

Very truly yours, Stone-Ordean-Wells Co. W. L. Mackay.

After receiving the above letter from Myers, plaintiff continued to sell goods to the Aurora Company, and payments were made thereon from time to time, until on September 23, 1911, there was a balance of \$2,560.75 owing the plaintiff for goods sold subsequent to February 8, 1908, at which time the company was adjudged a bankrupt. There
1[Exhibit 1.]

after payments by way of dividends were made so that on March 4, 1913, the date of the order for judgment herein, there was owing plaintiff a balance of \$1,935.18. The defendant had no notice or knowledge of the writing of Exhibits 1 and 2, or of any attempt on the part of Myers to withdraw from the guaranty, until after the indebtedness sued upon was incurred.

This is an action to recover upon the letter of credit above set forth, against Taylor alone. The trial court made findings of fact and ordered judgment for the full amount of the debt. From an order denying his motion for a new trial, defendant appealed.

There is no controversy over the facts. The case presents simply a question of law. Does the release of one surety operate to release his cosurety where the contract is a continuing guaranty, with the one surety released, before the debt sought to be recovered was incurred, without the knowledge or consent of the other surety?

On June 21, 1907, Taylor and Myers signed the instrument under consideration as sureties. At the time they were stockholders and officers in the Aurora Mercantile Company, jointly interested in its financial welfare. The company was indebted to the plaintiff in excess of \$6,000. They were desirous of procuring more time in which to pay this amount, and of obtaining a further line of credit for the company. Myers prepared the letter of credit at plaintiff's place of business, where it was executed by the sureties and accepted by the plaintiff. quently Myers disposed of his interest in the Aurora Company, and on February 8, 1908, served upon plaintiff a notice withdrawing from the guaranty. Plaintiff thereafter continued to furnish goods to the Aurora Company without informing the defendant of the notice served upon it by Myers until September, 1911. Under such a showing it cannot be said that either of the parties to the instrument intended that the other might revoke the guaranty as to himself, without notice to his cosurety, and thereby leave his associate liable for the full amount of the obligation.

"Persons are cosureties, so as to give the right of contribution, when they are bound for the performance by the same principal of the same duty; and whether they became so at the same time or at different times, * * * does not affect the relation nor the right. The right does

not seem to rest upon contract, * * * but upon this natural principle of equity, that where the same burden is assumed equally by several, and one of them is compelled to discharge it, the others ought to contribute each his share, so as to preserve equality." Young v. Shunk, 30 Minn. 503, 16 N. W. 402.

A surety has a right to stand on the precise terms of his contract. He can be held to no other or different one. In the case at bar both contracted together and with reference to the same responsibility. Each had recourse to the other for contribution in case of loss. The release of one affected the contract as to the other. This case is not taken out of the general rule by the fact that the defendant entered into the agreement with knowledge that his cosurety might revoke the contract of guaranty at any time by written notice. The authorities which sustain these principles are numerous. 3 Dunnell, Minn. Dig. § 9097; Brandt, Suretyship, § 441; People v. Buster, 11 Cal. 215; Sage v. Strong, 40 Wis. 575.

If the rule were otherwise, a surety might be subjected to risks never contemplated, for if a number should sign a guaranty and all but one should secretly withdraw, and no notice were necessary, the remaining surety might be held for the entire obligation. People v. Buster, supra.

We are of the opinion that the defendant was released from the guaranty by the withdrawal of his cosurety, for liability incurred subsequent to such withdrawal.

Reversed.

JOSEPH J. BRECHET v. JOHNSON HARDWARE COMPANY.1

March 22, 1918.

No. 20,781.

Easement — contract giving right to use stairway construed — loss of building by fire.

A right given by the owner of a building to the owner of an adjoining building to use a stairway and passageway in the first building for access ¹Reported in 166 N. W. 1070.

to the second floor of the adjoining building, does not grant an easement in the land, and is lost when the building, including the stairway and passageway, is destroyed by fire without the fault of the owner, and not restored by the construction of a new building and stairway in place of the old.

Action in the district court for Renville county to recover \$5,000 for obstructing a passageway. The answer set out the contract mentioned in the opinion, alleged defendant's building and stairway, without its fault, were destroyed by fire, and defendant fastened the fire door in the opening in the partition wall, but that it necessarily did so in protection of its said property and for the purpose of preventing trespassers from entering therein. The case was tried before Daly, J., who made findings and ordered judgment in favor of defendant. From an order denying his motion to correct the findings and conclusions or for a new trial, plaintiff appealed. Affirmed.

Charles J. Traxler, for appellant.

O. A. Allen, J. M. Freeman and L. J. Lauermann, for respondent.

Bunn, J.

The Hector Lumber & Supply Company owned Lots 22 and 23, Block 3, in the village of Hector, and a two story brick building situated there-Plaintiff owned the adjoining lot and a two story brick building thereon. The two buildings had a common party wall. In 1899 the lumber company entered into a written contract, by the terms of which, in consideration of one dollar, the lumber company, party of the first part, "demised, leased and let" to plaintiff, his heirs, executors, administrators and assigns, "access to and the right, jointly with the said party of the first part, to use that certain stairway located in the northwest corner of the two story brick building of said party of the first part, * * * and the use of the passageway leading from the head of said stairway to the door which opens from the building of the said party of the first part to the building of the said party of the second part adjoining said building first aforesaid upon the north, for the period of ninety-nine years from the date hereof." The contract contained other provisions, but the only one that is material on the question in the case is that providing that the lumber company, its successors or assigns, agrees "to keep said

stairway and passageway in a good and tenantable and safe condition at all times during the term of this lease."

The stairway was constructed by the lumber company as a part of its building. It led from the street in front of the building to a passageway on the second floor, which passageway led to an opening or door in the party wall, thus furnishing plaintiff access from the street through the lumber company's building to the second floor of his own building. Pursuant to the contract plaintiff and defendant, which succeeded to the rights of the lumber company, used the stairway and passageway in common from the date of the contract to February 26, 1916, when the building of defendant, except the foundation, basement and the party wall, was totally destroyed by fire. The stairway was totally destroyed. Thereafter defendant erected a new two story building on the site of the old one, using the old foundation basement and party wall. structed a new stairway in the building in the same place and of the same general kind as the one destroyed by fire. Plaintiff claimed the right under the contract to use this new stairway, but defendant blocked up the opening in the party wall, and refused to allow plaintiff to use the stairway. The second floor of plaintiff's building is reached by a stairway inside the building, extending up from the rear end of the ground floor. Plaintiff has been damaged by defendant's refusal to permit him to use the stairway in question to the extent of \$5 per month.

This action was brought to enjoin defendant from interfering with plaintiff's right to use the stairway and passageway, and to recover damages. The trial court found the facts substantially as above, and held that plaintiff was entitled to no relief. Plaintiff moved for amended findings and conclusions of law, and for a new trial. Plaintiff appeals from an order denying this motion.

Plaintiff contends that the contract created an easement running with the land for the entire length of the 99-year term, and that this easement was not lost by the destruction of the building or of the stairway or passageway. Defendant contends that the grant of the right to use the stairway and passageway in its building gave no interest in the soil which survived the destruction of the building, and that plaintiff acquired no right in the new building erected in place of the one destroyed.

The question thus stated must be determined by finding the intention

of the parties from the language of the contract construed as a whole. The contract employs the language of a lease; the first party "does demise, lease and let" to the second party, "access to" and " the right * * * to use that certain stairway," and the passageway leading from the head of the stairway to the opening in the party wall. The word "lease" The word "easement" is not, nor is the word "grant." No mention is made of what the rights of plaintiff will be in case defendant's building is destroyed by fire. Plaintiff was given no right of way over defendant's land, other than the right of access to the second floor of his building by the use of the stairway and passageway. This right would naturally terminate with the destruction of the building in which the stairway and passageway were. No provision of the contract obligates defendant to build a new building in case of the loss of the old one, or to build a stairway to furnish plaintiff access to his second story. The contract does obligate defendant to keep the stairway in a "good and tenantable and safe condition at all times during the term of this lease." But it is hardly permissible to construe this provision as binding defendant to build a new stairway in case of the destruction of the building. Counsel for plaintiff makes some claim that defendant's building was not completely destroyed, and that the stairway was not. The evidence showed that all that remained was the basement, foundation, party wall, and the bottom step of the stairway, which step was of stone. We think the destruction was substantially complete, and that the fact that the fire did not destroy the portions mentioned is immaterial on the question before us.

The law is thus stated in 14 Cyc. 1194: "Where an easement has been granted for a particular purpose in connection with a particular building, it is extinguished by a destruction of that building. A grant of the right to use the hall or stairway of a certain building gives no interest in the soil which will survive a destruction of the building, and the right ceases whenever the building is destroyed without the fault of the owner of the servient estate, and the owner of the easement will not acquire any right in any new building which may be erected in the place of the one destroyed." The cases cited in support of the text are Shirley v. Crabb, 138 Ind. 200, 37 N. E. 130, 46 Am. St. 376; Bonney v. Greenwood, 96 Me. 335, 52 Atl. 786; Douglas v. Coonley, 84 Hun, 158, 32 N.

Y. Supp. 444; Hahn v. Baker Lodge, 21 Ore. 30, 27 Pac. 166, 28 Am. St. 723, 13 L. R. A. 158; Bartlett v. Peaslee, 20 N. H. 547, 51 Am. Dec. 242. These cases fully support the text. Counsel for defendant cites a great many cases, but we find nothing in any of them that conflicts with the rule quoted from Cyc. The cases of Bangs v. Parker, 71 Me. 458; Hottell v. Farmers Protective Assn. 25 Colo. 67, 53 Pac. 327, 71 Am. St. 109; Chew v. Cook, 39 N. J. Eq. 396, and Reynolds v. Union Savings Bank, 155 Iowa, 519, 136 N. W. 529, 49 L.R.A.(N.S.) 194, are readily distinguishable.

It is quite unimportant what name we give to the instrument in question. If it granted plaintiff an easement in the building of defendant, it clearly did not grant him an easement in the land, and the right granted was lost when the building burned, and not restored when defendant constructed a new building. The argument of counsel to the contrary is interesting, and goes quite fully into the law of the construction of grants and the characteristics of an easement. We do not understand that he disputes the rule as we have just stated it. His contention, in addition to the claim that the building and stairway were not completely destroyed, seems to be that the contract gave plaintiff the right to use the stairway and passageway as an independent structure, and not as a part of defendant's building. We have duly considered this argument, and do not find it persuasive enough to take the case out of the principle stated. The fact is undisputed that the stairway and passageway were in the building and parts of it. Without further analyzing the able argument of counsel for plaintiff, which we have considered carefully, we conclude that the trial court correctly disposed of the case.

Order affirmed.

E. DIEUDONNE v. ARCO COMPANY.1

March 22, 1918.

No. 20,796.

Compromise and settlement — breach of warranty — evidence.

The admitted facts show that plaintiff's claim for breach of warranty had been fully settled and satisfied.

Action in the district court for Waseca county to recover \$175 for breach of warranty. The answer alleged that after the material and roofing had been applied to the roof for over a year and before plaintiff had paid the purchase price, he made the claim that the roofing did not comply with the written warranty; that the company claimed that it did comply with the warranty, and a dispute arose between the parties as to whether the roofing did comply with the warranty, and plaintiff proposed to the company that if it would furnish him free of charge two barrels of Arco Sealit of the value of \$100, he would release his claims under the warranty; that the company complied with the request. The case was tried before Childress, J., who when plaintiff rested denied defendant's motion to dismiss, and at the close of the testimony denied its motion for a directed verdict, and a jury which returned a verdict for \$100. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Reversed.

Moonan & Moonan, for appellant.

Henry M. Gallagher, for respondent.

TAYLOR, C.

Plaintiff purchased from defendant 1,500 pounds of a roofing preparation known as "Arco Sealit" for the sum of \$135 under the following warranty: "Guaranteed ten years water-proof. Will not crack, peel or blister or run with sun. 25 lbs. to cover 100 sq. feet on roof." Alleging a breach of the warranty, plaintiff brought this action for damages and

¹Reported in 166 N. W. 1067.

recovered a verdict. Defendant made an alternative motion for judgment notwithstanding the verdict or for a new trial, and appealed from an order denying the motion.

We find it unnecessary to consider more than one of the questions raised. The material, although purchased and used in the spring of 1913, was not to be paid for until May 1, 1914, so that plaintiff had nearly a year in which to ascertain whether it made a good roof before the purchase price became due. On March 19, 1914, and before the bill became due, plaintiff wrote defendant, calling attention to the warranty and stating that much more than 25 pounds per 100 square feet had been required to cover the roof, that the material had cracked and the roof was leaking in numerous places, and that he would "not pay for it in this condition." On March 25, 1914, defendant replied, asserting that the material was all right and that the defects must have resulted from failure to follow the directions for applying it, and inclosed a copy of of the directions saying: "You can see for yourself whether it has been properly applied." The evidence at the trial showed that in fact the material had been placed upon an old dry felt roof containing cracks. without first preparing the felt in the manner pointed out in the instructions. In this same letter of March 25 defendant, stating that it wished to be fair in the matter, made the following proposition: "You tell us what kind of a roof you are going to cover, we will then send you enough material to cover the area intended without charge, with the understanding that you pay your bill as it now stands." On March 31, 1914, plaintiff replied to this letter, and, after describing the condition of the roof both before and after the material had been applied, stated that the men who performed the work claim "that it will take at least two barrels more now to go over most of it again," and then stated: "You send me this and I will call it O. K." On April 6, 1914, defendant replied accepting plaintiff's proposition and shipped the two barrels of material containing over 1,100 pounds which plaintiff received and applied upon his roof. Thereafter plaintiff paid the purchase price for the original material. Something more than two years later plaintiff demanded the return of the amount paid on the ground that within a few months after the payment had been made the roof had again become defective. Defendant replied to the effect that the fault was not in the material but in the failure to follow instructions in applying it, and that plaintiff's claim had been fully settled and that no further claim would be recognized. This suit followed.

We think the above facts, which are conceded, constitute a full compromise and settlement of plaintiff's claim for the alleged breach of the warranty. Plaintiff asserted that the fault was in the material; defendant that the fault was in the failure to follow instructions in applying it. The damages were unliquidated. The purchase price was \$135. Plaintiff offered to settle the controversy for two additional barrels of material. Defendant accepted plaintiff's proposition and promptly furnished this additional material of the value of \$100, and plaintiff accepted it and used it. This constituted a full satisfaction of his claim. Truax v. Miller, 48 Minn. 62, 50 N. W. 935; Sunset Orchard Land Co. v. Sherman Nursery Co. 121 Minn. 5, 140 N. W. 112; Neibles v. Minneapolis & St. L. Ry. Co. 37 Minn. 151, 33 N. W. 332.

The order appealed from is reversed and the trial court will direct judgment for the defendant.

HENRY C. EMKEE AND ANOTHER v. ELIZABETH AHSTON AND OTHERS.¹

March 28, 1918.

No. 20,724.

Conveyance to child charged with payments to other children — their rights lost by reconveyance.

In a transaction by which the parents conveyed certain real property to their son, in consideration of an agreement on his part to make provision for their support during the remainder of their lives, and also to pay certain specified sums of money to other children of the grantors, all of mature years but not parties to the contract, within six months after the death of the parents, which payments were declared by the contract liens upon the property until paid, it is held:

1Reported in 166 N. W. 1079.

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That the provision for the payments to the other children was not founded upon a valuable consideration, was a mere incident to the main contract, created no irrevocable rights in such other children, and that the obligation to make the payments was discharged and the liens abrogated upon the rescission and abandonment of the contract by the parties thereto, and a reconveyance of the property to the parents.

Action in the district court for Steele county by the purchasers of certain land to determine the adverse claims of the defendants. The case was tried before Childress, J., who made findings and ordered judgment in favor or plaintiffs. From the judgment entered pursuant to the order for judgment, Celia Thietje, and other children of Jacob Kruger and his wife who were named in the deed mentioned in the first paragraph of the opinion, appealed. Affirmed.

Leach & Leach, for appellants.

Nelson & Nelson, for respondents.

Brown, C. J.

Action to determine adverse claims to real property. Plaintiff had judgment and defendants appealed.

There is no controversy about the facts and they are substantially as follows: Jacob Kruger was the owner of the land, a farm consisting of 80 acres, upon which he had resided with his family for many years. On September 5, 1911, he conveyed the same, his wife joining therein, to his son Albert C. Kruger, in consideration of an agreement by the grantee to pay to the grantors the sum of \$200 annually thereafter during the remainder of their lives, and to furnish them, or the survivor, each year a dressed hog weighing not less than 200 pounds. It was also provided that the grantee should pay to certain of the children of the grantors, brothers and sisters of the grantee, all of mature years and residing in homes of their own, certain specified sums of money, ranging from \$5 to \$300, within 6 months after the death of the grantors. These several sums were by the contract expressly made and declared liens upon the land until paid. The conveyance of the land was in the form of a warranty deed, the contract expressing the consideration therefor and creating the liens just mentioned was in writing, and both instruments were recorded in the office of the register of deeds. We assume that the

grantee took possession of the property, though the record is not clear upon the point. But there is no evidence that he ever performed any of the conditions of the agreement in consideration of which the land was conveyed to him.

On October 27, 1913, some two years later, the property was reconveyed by the grantee to the grantors, the conveyance being in the form of a warranty deed in which the consideration was expressed at one dollar "and other good and valuable considerations * * * in hand paid." Just what the other good and valuable considerations were does not appear. The deed bears date October 1, 1913, but was not executed and delivered until the twenty-seventh. Upon thus becoming reinvested with the title to the land the Krugers on the same day sold and conveyed the same to one Albert Schwake for the consideration of \$10,600. The conveyance was with full covenants of warranty, and that the premises were free from all incumbrances. Thereafter, on the sixteenth day of March, 1914, Schwake and wife conveyed the premises to plaintiffs in this action for the consideration of \$10,600. The deed contained a covenant that the premises were free from all incumbrances, except the liens created by the contract of support executed as a part of the first transaction herein referred to, "in case said liens have any validity."

The object of the action was to determine the validity of the liens and defendants interposed them in defense. The trial court held them invalid, and, aside from a ruling excluding certain evidence, the correctness of that conclusion is the only question presented by the appeal.

It is the contention of defendants that the transaction by which the liens were created, being founded upon a valid consideration, vested in them rights which the grantors could not revoke or recall, and that the trial court was in error in holding the liens of no force or effect. We do not concur in that view of the case.

It may be conceded that an executed transfer of property or an executed grant of a property right, whether in the form of a gift or founded on a valuable consideration, is beyond recall by the grantor, except for fraud and mistake, and cannot be revoked or canceled after acceptance by the grantee, and, when not burdened with conditions, a compliance with which is necessary to the vesting of of the granted right, acceptance will be presumed. Yet to be irrevocable and beyond recall the

transaction must be fully completed and in no essential respect left dependent upon the performance of future conditions. 12 R. C. L. 952. But the evidence does not bring this case within the rule. The conveyance of the property by the Krugers to the son Albert did not unconditionally vest title in the grantee. On the contrary the passing of full title was reserved and made dependent upon a performance of the conditions imposed by the support agreement, a failure of which would constitute a breach of the contract entitling the grantors to either an annulment of the conveyance, or to such other relief as might be appropriate to the facts presented. Bruer v. Bruer, 109 Minn. 260, 123 N. W. 813, 28 L.R.A.(N.S.) 608. The law in this respect is well settled in this state and the adjudications are referred to in the case cited.

The important inquiry is whether the lienholders became vested with rights which survived the rescission and abandonment of the contract by the immediate parties thereto. The question must be answered in the negative.

The primary purpose of the transaction was to secure to the grantors the stipulated support during the remainder of their lives. not in the interest of defendants, they were not parties to the contract, and were not thereby charged with the obligation imposed upon the grantee to support the grantors. In fact the annual payments required thereby would soon exceed the aggregate amount of the liens, thus making the burdens of the contract greater than the ultimate benefits, which presumptively the lienholders would not have assumed for the mere purpose of protecting the liens. So taking the transaction as a whole, it is clear that the purpose of the grantors was not to vest in the lienholders independent rights, but in a measure to equalize the distribution of their property after their death. The land was conveyed to the son for the consideration of \$200 to be paid annually during the lives of the parents. The latter no doubt thought that it would be unfair to the other children not to give them some share in the property, hence the creation of the liens. But the grant was not beyond recall. There was no valuable consideration moving from the other children and they were charged with none of the burdens of the contract. While some evidence was offered which tends to show an intention on the part of the grantors to discharge some obligation for services rendered by them

when they resided at home, it is not of a character to require a finding that such was the purpose of the transaction. No finding was made upon the question. The evidence is not conclusive to that effect, and it necessarily follows that the creation of the liens was a mere incident to the main transaction, to stand or fall therewith. Whether a different question would be presented in such a case by a specific grant of an undivided interest in the land conveyed, to become effective after the death of the grantor, we do not stop to consider. Strothers v. Woodcox, 142 Iowa, 648, 121 N. W. 51.

That the parties abandoned and rescinded the contract is conclusively shown by the evidence. But whether by mutual consent or because of a breach of conditions, or both, does not clearly appear. But we may assume, in the absence of a showing to the contrary, that the basis thereof was a failure of performance by the grantee. If such was not the cause and the reason therefor was the accomplishment of some purpose illegal and violative of the rights of the lienholders, the burden was upon defendants to show the fact in support of their claim of an interest in the land. Walton v. Perkins, 28 Minn. 413, 10 N. W. 424. The case of Strothers v. Woodcox, supra, is not in point. In that case a defeat of the rights granted to third persons by a breach of conditions was expressly recognized.

2. There was no error in the exclusion of evidence offered for the purpose of showing that plaintiffs knew of the liens and purchased the property subject thereto. The contract of purchase was in writing and expressly referred to the liens with the statement that the title was incumbered thereby if they are of "any validity." In the face of this conditional liability, expressed by the written contract, no absolute liability verbally created could be shown.

Our conclusions are in harmony with those of the learned trial court and the judgment appealed from is affirmed.

STATE v. LAURIE MARX.1

March 28, 1918.

No. 20,736.

Grand larceny — conviction sustained by evidence — evidence in rebuttal prejudicial.

Defendant was convicted of grand larceny and appeals. It is held:

- (1) The indictment was sufficient.
- (2) The evidence, though conflicting and not at all conclusive of guilt, justified the verdict.
- (3) Defendant's brother testified as a witness on behalf of defendant. On cross-examination he was asked if he did not say to the complaining witness that his brother was a "crook." He denied making such statement. His answer was final, and it was prejudicial error to permit complaining witness to testify in rebuttal that the witness made such statement to her.

Defendant was indicted by the grand jury for the crime of grand larceny, tried in the district court for Le Sueur county before Tifft, J., and a jury which returned a verdict of guilty as charged in the indictment. Defendant's motion for a new trial was denied. From the judgment and sentence to the state reformatory for an indeterminate period, and from the order denying his motion for a new trial, defendant appealed. Reversed.

Charles C. Kolars, for appellant.

Lyndon A. Smith, Attorney General, James E. Markham, Assistant Attorney General, and L. W. Prendergast, County Attorney, for respondent.

Bunn, J.

Defendant was convicted of the crime of grand larceny in the first degree, and appeals from the judgment and from an order denying his motion for a new trial.

¹Reported in 166 N. W. 1082.

It is contended by defendant on this appeal: (1) That the indictment did not state a public offense; (2) that the evidence was insufficient to justify the verdict of guilty; (3) that there were prejudicial errors in rulings on the admission of evidence.

1. The indictment charged that defendant, at the time and place specified, "did then and there, being in possession, custody and control as a bailee and a person authorized by agreement to take and hold possession, custody and control of certain personal property, to-wit: One Cole automobile, six cylinder, black in color, model of the year 1914, a more particular description of said automobile being to this grand jury unknown, and being then and there of the value of twenty-five hundred dollars, and being then and there the property of one Lyndia Denzer, said automobile being so held by said Laurie Marx for storage and care in accordance with an agreement theretofore entered into by and between said Laurie Marx and said Lyndia Denzer, a more particular description of which said agreement is to this grand jury unknown, did then and there unlawfully, wilfully and feloniously and with intent," etc., etc., "appropriate said property to his own use."

The point made against this indictment is that it fails to state the terms of the agreement under which defendant had custody of the car as bailee, and particularly that it fails to state that the bailment was for hire. We hold the indictment good. It follows the language of the statute (G. S. 1913, § 8870, subd. 2), and sufficiently apprises defendant of the crime with which he is charged. State v. Mims, 26 Minn. 191, 2 N. W. 492, was decided under a statute which made it an essential ingredient of the offense that the property shall have been delivered to defendant for the purpose of being carried and delivered to another for hire. Under section 8870, subd. 2, it is not necessary that the bailment be for hire. We see nothing in State v. Holton, 88 Minn. 171, 92 N. W. 541, State v. Schoemperlen, 101 Minn. 8, 111 N. W. 577, or in any of the cases cited by counsel for defendant, that gives any ground for holding that the indictment here does not set out with sufficient particularity the terms of the bailment. State v. Barry, 77 Minn. 128, 79 N. W. 656.

2. Defendant conducted a garage at Le Sueur, and was the local agent for the sale of the Cole automobile. Lyndia Denzer was, in the year 1914, a young lady of 21, living with her mother and sister in Le Sueur;

she was employed in a store part of the time, and also worked as a telephone girl. Her testimony on the trial was in substance as follows: She met defendant in March, 1914. He importuned her to buy a Cole automobile; she told him that the price, \$2,500, was too much for her to pay, that she had no money to pay with; defendant said that she had land, and that the bank would take a mortgage and loan her the money to buy the car; that defendant offered to give her free storage for a year at his garage; she obtained from the bank a draft for \$2,500. giving a mortgage on her land, and indorsed and delivered the draft to defendant; she and defendant drove the car around town several times, defendant endeavoring to teach her how to run it; she did not succeed in learning before she went to St. Peter to work in a hospital there; the car was left in defendant's garage, with directions from Miss Denzer that defendant was not to use the car or take it out of the garage, until she was there to learn to run it. She was in St. Peter a month, before she returned to Le Sueur, and, without her consent or knowledge, defendant took the car to Mankato and sold it, receiving in payment notes for \$2,530, and \$300 cash.

Defendant admitted that he sold the car as stated. The controversy on the trial was over the question whether the car belonged to Miss Denzer or to the defendant. His testimony was to the effect that he tried to sell Miss Denzer a car, but that she refused to buy; that she offered to lend him money with which to buy a car, to be used as a demonstrator and then sold, she and defendant to divide the profits; that he accepted this offer, and Miss Denzer delivered the draft for \$2,500 to him; that he purchased the car, used it constantly as a demonstrator, and sold it in Mankato as before stated.

Defendant's brother corroborated his story, but there was little other direct or very persuasive circumstantial evidence that bore upon the pivotal question as to who owned the car at the time defendant sold it. One story seems about as probable as the other, the improbable thing being an admitted fact, that is, the raising of \$2,500 on a mortgage by this young girl, and the delivery of the money to defendant. If the car belonged to Miss Denzer, defendant was guilty of the crime charged. If it belonged to him, he was innocent of this crime. While the evidence is not wholly satisfactory, we are not prepared to say that the

jury was not justified in accepting as true the girl's version of the transaction. As we have reached the conclusion that there must be a new trial for errors in the rulings on evidence, we say nothing more definite as to the sufficiency of the evidence. Defendant's guilt was certainly not clearly established, and a verdict in his favor would not have been subject to criticism. We point this out for the obvious bearing it has on the question whether the errors hereafter discussed were prejudicial.

3. Defendant's brother testified in his favor. On cross-examination he was asked if he did not state to Miss Denzer, "that your brother Laurie (the defendant) was a crook." The witness denied making this statement. In rebuttal Miss Denzer was permitted over objections to testify that defendant's brother did make the statement to her.

It was of course irrelevant to the issue of the case whether defendant was a "crook." It was discretionary with the trial court to require the witness on cross-examination to answer whether he had made the statement, as an affirmative answer might affect the credibility of the evidence he had given. But when the witness denied making the statement, the matter being collateral and irrelevant to the issue in the case, his answer was final, and he could not be impeached by evidence showing that he did make such statement. This is all elementary, and well settled in this state. Murphy v. Backer, 67 Minn. 510, 70 N. W. 799; 3 Dunnell, Minn. Dig. § 10348, and cases cited. Campbell v. Aarstad, 124 Minn. 284, 144 N. W. 956. And we are forced to hold that the error was prejudicial, and requires that a new trial be granted.

The complaining witness was asked on cross-examination whether during the year 1914 she had not stated to one Huberty that she had not bought a car this year. She answered in the negative. Defendant called Huberty as a witness; he testified to a conversation with the complaining witness, but, when asked if she made the statement claimed, an objection was sustained. The testimony was clearly admissible, if the conversation was after the time Miss Denzer claimed to have purchased the car from defendant. Perhaps the ruling might be sustained on the ground that the time of the conversation was not shown. We mention the matter in view of a second trial.

We also think that the trial court unduly limited the cross-examination of the complaining witness as to her object in consulting an attorney in relation to a civil action against defendant. There was a long delay in beginning the criminal prosecution, and attempts in the meantime by Miss Denzer to collect the money from defendant. These facts, with the reasons and motive of the complaining witness, were proper subjects of inquiry.

Judgment and order reversed and new trial granted.

T. P. COCHRANE v. INTERSTATE PACKING COMPANY.1

March 28, 1918.

No. 20,742.

Corporation — assessment on stockholders — right to refund passed with transfer of stock.

The stockholders of defendant, a corporation, at its request, by five written agreements, voluntarily assessed the shares of stock held by them, and paid such assessments into its treasury to restore defendant's impaired capital and credit. The three first agreements provided for a refund out of the corporation's first net profits. The fourth contained no refund provision, but that agreement was made necessary only because through an error the one made a month before was unintentionally too small. By the fifth, or last, agreement, the assessments paid thereunder were to be refunded before any dividends were declared and before any refund on account of prior assessments, but it was not stated that the refund should come out of the first net profits. Plaintiff signed the last agreement only and paid the assessment therein called for; the previous assessments upon the shares of stock now held by him were paid by the then owners. It is held:

- (1) Plaintiff was entitled to demand and receive a refund whenever the accumulation of the net profits, or surplus, equalled or exceeded the total amounts of all the assessments paid by all the shareowners.
- (2) This right of refund passed with the transfer of the shares from the holders thereof who had paid the first four assessments to plaintiff's assignor, and with the transfer from him to plaintiff.

¹Reported in 167 N. W. 111.

Action in the district court for Winona county to recover \$8,100. The facts are stated in the opinion. The case was tried before Granger, J., who made findings and as conclusions of law ordered judgment in favor of plaintiff for the amount demanded. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

Briggs, Thygeson & Everall and Brown, Abbott & Somsen, for appellant.

Webber & Lees, for respondent.

HOLT, J.

The defendant, a corporation engaged in the business indicated by its name, at the close of the year 1907, found its capital impaired, and all the stockholders signed this instrument, hereinafter referred to as Exhibit A: "We, the undersigned stockholders of the Interstate Packing Co. hereby subscribe to an assessment of ten (10) per cent on the stock held by each of us respectively, to cover the net loss of the company for the year ending September 30th, 1907; which is to be refunded out of the first net profits of the company and from time to time until the whole amount subscribed shall have been refunded. The condition being that all stockholders join in this subscription before becoming effective, after which each one agrees to make payment." The amount subscribed was paid. Towards the end of 1908 the company found that its business had been carried on at a loss during that year, that its line of credit at the banks was exhausted, and that the need of a new building was imperative. To relieve the situation, the stockholders, on October 8, 1908, subscribed two separate instruments, herein called Exhibits B and C, both substantially of the same tenor as Exhibit A, except that the amount of the assessment in each was 5 per cent and that the one, Exhibit C, was made to provide the means for the needed building, and which, after reciting that the amount realized from the assessment should be treated as a surplus and separate account thereof kept, contained this condition:

"The same to be refunded and returned out of the net profits, after the assessments previously made for deficits shall have been made good, as provided for and before any dividends are declared."

A month later an error in the financial statement, upon which the assessment in Exhibit B was based, was discovered. This error had

caused the deficit to appear \$7,000 less than it actually was. The stockholders again came to the rescue, and by a written agreement, herein named Exhibit D, signed by all, subscribed an additional assessment of 5 per cent on their then holdings. This agreement confirmed the two preceding October assessments, and recited that the error mentioned occasioned this additional assessment, but it contained nothing in respect to refundment. These four assessments, amounting to 25 per cent on the shares of stock issued, were all paid in. Defendant kept an account thereof, and its records show these transactions with the stockholders as well as the one now about to be stated. Neither the funds thus obtained from the stockholders nor the \$43,700 realized from the issuing of preferred stock in 1909 availed to put defendant on a firm financial footing, or made its business profitable; for, towards the close of 1911. the books showed a deficit of over \$29,000. Another assessment of 20 per cent was proposed. The holders of more than one-third of the common stock issued refused to submit to further assessments, but were willing to part with their shares for little or nothing, providing they could be secured against the statutory stockholders' liability. Mr. Jacobson, the president, undertook to acquire and dispose of their shares on the terms stated, the remaining stockholders and those who obtained the stock which Jacobson thus acquired to pay the additional assessment. They so did by subscribing an agreement to that effect. This instrument, herein referred to as Exhibit E, provides that

"The amount of said assessment to be repaid to the subscribers before any of the profits of the company are paid to the holders of any of the other common stock of the company either as dividends or in repayment of any previous assessments; provided, however, that this subscription shall not be effective unless subscribed to by the owners of not less than 75 per cent of the total amount of common stock issued and paid for before the 30th day of November, 1911; and that the written consent to the repayment thereof before any dividends are paid on the common stock, or any other assessments are refunded, be obtained of all stockholders of common stock not signing this agreement."

All the then stockholders but one signed Exhibit E, and he executed his consent to the refundment provision.

Beginning with 1912 the business of defendant prospered so that when

this action was begun the \$29,000 deficit of 1911 was wiped out, and a surplus of undivided profits exceeding \$50,000 had been created, which surplus had reached nearly \$70,000 at the time of trial. The total payments under the several subscription assessments amount to \$42,415. Of the shares of stock which Jacobson acquired under the above mentioned arrangement of 1911, plaintiff now holds 180, one Mergens 100, and Jacobson the balance. Plaintiff was secretary and treasurer from the time he became interested in the corporation, early in 1912, until September 30, 1916, when dissensions arose which led to a change in the officers whereby plaintiff lost his position.

He then demanded the repayment of the 45 per cent paid in upon the stock held by him, amounting to \$8,100. Of this he had personally paid the last assessment in the sum of \$3,600, and \$4,500 had been paid by former owners of that stock. The demand was refused; and this action to recover the amount was instituted. The answer raised the defense that the surplus was needed to run the business advantageously, and so long as no dividends had been declared the time for the refundment of these voluntary assessments rested in the discretion of the board of directors. In short, there was nothing yet due. And as a further defense it was alleged that, under an agreement existing between plaintiff and Jacobson, all refundments, including the 20 per cent assessment paid in by plaintiff, should be made to Jacobson. There was no substantial dispute as to the facts hereinbefore recited, and as found by the court, except as to the last mentioned defense, and, upon ample evidence, the court found that no such agreement as to refundment was made with Jacobson. Judgment was entered pursuant to the findings against defendant for \$8,100, the total amount paid in by the holders of the 180 shares of stock now owned by plaintiff. Defendant appeals.

Very likely the best interests of all concerned would be subserved by postponing the refundment of these assessments to a more opportune time. Present prices of labor and material necessitate a much larger working capital for a plant of this kind than formerly. But courts may not decline to enforce a plain contract right demanded by a litigant, even though convinced that a refusal would be for his best interest as well as for that of his adversary. Whether plaintiff is entitled to the refund now must, therefore, be determined from the contracts themselves.

In so doing it is both proper and necessary to consider the effect of Exhibit E upon the stipulations contained in the preceding contracts.

Defendant's position is, in short, that those who signed and performed Exhibit A, as well as those who acquired stock from them, by executing Exhibit E made the specific and certain refundment condition of Exhibit A entirely nugatory; therefore, since the assessment under Exhibit E is to be refunded before that paid under Exhibit A can be demanded, and since no definite time for refundment is mentioned in Exhibit E, other than it is to be made before any profits are distributed to the holders of common stock, either as dividends or in repayment of any previous assessments, the entire refundment proposition is necessarily left to the control of the board of directors. We cannot assent to this construction of the contracts involved.

The four previous assessment agreements were clearly in mind of the parties when the fifth, and last, was prepared and executed. All the assessments had the same purpose in view, to tide over the financial troubles of defendant, and when that was accomplished to restore to the stockholders the temporary addition they had made to the shares of capital stock held by them. Exhibit E should therefore be construed in connection with Exhibit A. So doing, we do not think there was any intention to change or modify the terms of Exhibit A as to the right to a refund from the first net profits, except to the extent that there must be an accumulation of net profits or surplus to an amount sufficient to refund all the intervening assessments to which the right of refund existed, before the right to any refund whatever accrued. This plainly holds good as to Exhibits B and C as well as to Exhibit A. When the time arrived that the net profits were more than adequate to return all the assessments paid in there would seem to be a clear right for any one entitled to participate in the refund to demand and receive it.

We do not consider that the omission to provide for refundment of the amount paid in under Exhibit D precludes a recovery thereof. That agreement was necessitated by the error above referred to, and was made in order to fully accomplish what the error partially prevented the assessment under Exhibit B from accomplishing, viz., wipe out the deficit. No shares of stock had in the meantime changed ownership. All the doings of defendant and its officers in relation to raising funds by this

valuntary assessment of the stockholders imply a promise to repay. Corporations, like individuals, may be held upon an implied promise. Deane v. Hodge, 35 Minn. 146, 27 N. W. 917, 59 Am. Rep. 321; Rogers v. Hastings & Dakota Ry. Co. 22 Minn. 25.

The next contention is that the amounts paid into the treasury of the defendant under the various agreements became personal loans from the individuals who paid, and did not attach to the shares of stock held by those who made the payment so as to follow a subsequent transfer of the shares. Therefore, it is claimed, in no event is plaintiff entitled to any refund on the first four assessments paid by the prior owners of the 180 shares he now holds. We doubt the merit of the claim. The intention of those prior owners seems to have been to part with all interest in defendant and its business upon securing a release or protection against statutory liability incurred from having been shareowners. But, be that as it may, that defense, in all fairness, should not now be open to defendant. In its answer it specifically alleges that Jacobson, who procured from those who paid the first four assessments these 180 shares of stock which plaintiff now holds, is entitled to whatever refund there may be coming, because of an agreement made between Jacobson and plaintiff to that effect. Defendant thereby concedes that the right to the refund passed with the shares of stock into Jacobson's hands when he procured them, and remained with him when the shares were transferred to plaintiff only because of the alleged agreement. The former owners are not here to complain, nor does defendant seem apprehensive that they ever will for it has not seen fit to have them interplead.

Indeed, on the merits, we think the right to refund, under these contracts, passed with a transfer of the shares of stock. It appears from a consideration of the method pursued by defendant, its officers and stockholders, with respect to these voluntary assessments, that the amounts paid thereunder were not regarded as loans from the individuals, but as contributions to defendant's capital by restoring the value of the shares of the issued stock to par, pending the accumulation of an anticipated surplus from net profits. The assessments became a surplus fund for defendant's use. The agreement on the part of defendant was to create out of the first net profits an equivalent surplus fund to be distributed, when so doing would still leave the value of the outstanding

shares at par. The first three assessment agreements speak of refundment from the net profits. Exhibit C treats the assessment paid in as a "surplus fund." The net profits of a corporation go to make up its surplus. It denotes what remains after defraving every expense, including loans falling due as well as interest on such loans. Mobile & O. R. Co. v. Tennessee, Co. 153 U. S. 486, 14 Sup. Ct. 968, 38 L. ed. 793. Profits are the surplus earnings available for the payment of dividends. Williams v. Western Union Tel. Co. 93 N. Y. 162; Park v. Grant Locomotive Works, 40 N. J. Eq. 114, 3 Atl. 162. The net profits, or surplus, of a corporation belong to its shareholders, when it is to be distributed either under the authority of the local board of directors or, as here, pursuant to the terms of a contract the distribution would naturally be to the then shareowners. This leads to the conclusion that all concerned intended that a transfer of the shares of stock transferred also the right to participate in the refund of the assessments paid upon such shares. We find no legal principle opposed to this conclusion, and regard it supported not only by a consideration of the assessment agreements but by the position taken by the defendant in its answer, by Jacobson on the witness stand, and by the contracts in evidence through which Jacobson procured the stock under the 1911 arrangement, particularly the Knauff shares.

The judgment is affirmed.

JAMES BRAZIL v. COUNTY OF SIBLEY.1

March 28, 1918.

No. 20,753.

Highway — appeal from municipal board — when decision as to propriety of improvement is not reversible.

1. In proceedings for the establishment of public improvements, authorized by law to be heard and determined by local municipal boards and officers, all questions in respect to the propriety and necessity of the particular improvement are legislative in character and the determination thereof by the local tribunal is final and will be set aside by ¹Reported in 166 N. W. 1077.

the court on the statutory appeal only when it appears that the evidence is practically conclusive against it, or that the local board proceeded on an erroneous theory of the law, or arbitrarily and against the best interests of the public.

Same — such question not tried de novo.

2. The appeal does not bring up such matters for determination by the court de novo, and the trial court erred in submitting the same to the jury in this cause as an original question.

Same — specific questions may be put to jury.

3. In appeals in highway proceedings the court, in its discretion, may submit specific issues to a jury, as in civil actions.

From an order of the county commissioners of Sibley county denying a petition to change a county road, James Brazil appealed to the district court for that county. The appeal was heard before Tifft, J., and a jury which found in favor of appellant. From an order denying its motion for a new trial, the county of Sibley appealed. Reversed.

- A. L. Young, County Attorney, and Young & Quandt, for County of Sibley.
 - T. O. Streissguth and W. C. & W. F. Odell, for James Brazil.

Brown, C. J.

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A petition under the statute for a change and alteration of an alleged existing public highway was duly presented to the board of county commissioners of Sibley county, the prayer of which after due hearing and consideration was denied and the proceeding dismissed. An interested landowner under section 2548, G. S. 1913, appealed to the district court of the county where in the due course of procedure a trial was had before a jury, resulting in a verdict reversing the decision of the county board, and ordering that the proposed change in the highway be made as prayed for in the petition. The cause was brought to this court by an appeal from an order denying a new trial.

The assignments of error present two principal questions, namely: (1) Whether the trial court erred in directing a submission of the issues to a jury; and (2) whether there was error in the instructions as to the character of the issue to be determined.

- 1. The statute regulating the hearing of appeals of this kind (section 2550, G. S. 1913), does not expressly prescribe the manner of trial, whether by the court or by a jury, though both methods are thereby plainly recognized. But, in view of the fact that the statute requires the appeal to be brought to trial at a general term of the court, it seems clear that the legislature contemplated a trial in harmony with the usual court procedure, which would at least vest in the court the discretionary power to order the submission of all or any specific issue to a jury, as in ordinary civil actions. Section 7792, G. S. 1913. This is particularly true where the question of damages is involved, though there may be no absolute right to such a trial. Board of Water Commissioners v. Roselawn Cemetery, 138 Minn. 458, 165 N. W. 279. We so construe the statute. But in view of the restricted nature of the question presented, where the appeal brings up for review only the correctness of the decision of the lower tribunal as to the propriety and necessity of the proposed improvement, as will be presently stated, the most appropriate procedure would seem to be a trial without a jury. There might be some difficulty in impressing upon the mind of the jury the precise scope and extent of their duty in such a case. But whether the question should be so submitted must rest in the sound judgment of the trial court.
- 2. The primary question presented to the county board in this case was whether public interests justified the proposed change in the highway, and, if made, whether public convenience would be promoted thereby. The board decided the question in the negative and dismissed the petition. It was assumed on the trial of the appeal below that the same question was before the court, and the jury was instructed that in disposing of it they should consider the evidence and come to a conclusion without regard to the determination of the county board, "that is, you are to determine this question just as you would determine it, were it submitted to you in the first instance." In thus presenting the case to the jury the learned trial court was in error.

The question whether public interests require or will justify a particular improvement of the character of that here involved is legislative in character and in no proper sense judicial. The determination thereof may be delegated by the legislature to local municipal boards and administrative officers, but cannot be conferred upon the courts, except in spe-

cial instances where a determination thereof is incidental to the exercise of its jurisdiction in a proceeding properly of judicial cognizance. State v. Crosby, 92 Minn. 176, 99 N. W. 636; State v. Ensign, 55 Minn. 278. 56 N. W. 1006. The rule applies to all public works and improvements involving an exercise of legislative judgment and discretion which are committed to local municipal control, including highway, drainage and other proceedings for the taking of private property for a public use, and the organization of public corporations or their consolidation. State v. Simons, 32 Minn. 540, 21 N. W. 750; Schweigert v. Abbott, 122 Minn. 383, 142 N. W. 723; Sorknes v. Board of Co. Commrs. of Lac qui Parle County, 131 Minn. 79, 154 N. W. 669; School District No. 40, Rock County v. Bolstad, 121 Minn. 376, 141 N. W. 801: Hunstiger v. Kilian. 130 Minn. 474, 153 N. W. 869, 1095; Webb v. Lucas, 125 Minn. 403, 147 N. W. 273; Fohl v. Common Council of Village of Sleepy Eye Lake, 80 Minn. 67, 82 N. W. 1087; Minneapolis & St. Louis R. Co. v. Village of Hartland, 85 Minn. 76, 88 N. W. 423; Chicago, M. & St. P. Rv. Co. v. Village of Le Roy, 124 Minn. 107, 144 N. W. 464. In all instances where an appeal from the determination of the local tribunal has been provided for, by which an aggrieved party may remove to the district court the entire proceeding and all questions presented therein, including that of public interests, in considering the same we have uniformly applied the rule stated, and as respects the question of propriety and necessity limited consideration of the appeal to the inquiry whether the local board acted arbitrarily and in disregard of the best interests of the public, or upon an erroneous theory of the law, or whether the evidence is practically conclusive against the order appealed from. Farrell v. County of Sibley, 135 Minn. 439, 161 N. W. 152. And as remarked by Mr. Justice Hallam in Hunstiger v. Kilian, supra, any attempt by the legislature to confer greater authority upon the courts in such proceedings would be unconstitutional. The case of Minneapolis & St. Louis R. Co. v. Village of Hartland, supra, involved substantially the question here before the court, and it was held that the decision of the local tribunal could not be disturbed since the evidence was not conclusive against it. There is nothing in the case at bar to distinguish it from those cited, and we follow and apply the rule there laid down. The appeal in such proceedings does not bring up the question of public necessity for trial de novo.

It follows that the instructions of the learned trial court were erroneous, and there must be a new trial.

Order reversed.

STATE EX REL. WILLIAM MURRAY v. E. F. KELLEY.1

March 28, 1918.

No. 20.860.

Criminal law - exclusive jurisdiction of municipal court.

Where a criminal offense is committed within a city having a municipal court, the municipal court of another city has no jurisdiction of such offense, either for the purpose of trial or for the purpose of holding a preliminary examination.

Upon the relation of William Murray the district court for Polk county granted its writ of habeas corpus directed to the sheriff of that county. The matter was heard by Watts, J., who made findings and quashed the writ. From the order quashing the writ, relator appealed. Reversed.

- F. C. Massee, for relator.
- G. A. Youngquist, County Attorney, and J. E. Montague, Assistant County Attorney, for respondent.

TAYLOR, C.

The city of Crookston and the city of East Grand Forks are both in Polk county and both have a municipal court. The relator was arrested and taken into custody under a warrant issued by the municipal court of the city of Crookston for an offense alleged to have been committed in the city of East Grand Forks. He made a motion to dismiss the proceeding on the ground that the municipal court of Crookston had no jurisdiction of the offense. This motion was denied and he then procured

¹Reported in 167 N. W. 110.

a writ of habeas corpus from the district court. The hearing in the district court resulted in an order quashing the writ and the relator appealed therefrom to this court.

Section 262, G. S. 1913, provides that in criminal matters municipal courts "shall have all the powers and jurisdiction * * * of courts of justices of the peace." Section 265 provides: "No justice of the peace shall have jurisdiction of offenses committed in any city or village wherein a municipal court is organized and existing, but all such offenses otherwise cognizable by a justice shall be examined and tried by such municipal court. * * * Said court shall have jurisdiction concurrently with the justices of all offenses committed elsewhere within the county."

Section 7619 defining the jurisdiction of justices of the peace in criminal matters contains a provision to the same effect. It is clear that under these statutes a justice of the peace has no jurisdiction of an offense committed within the city of East Grand Forks; and the municipal court of Crookston is given no other or different jurisdiction over criminal offenses committed outside the city of Crookston than is given to a justice of the peace of the county. State v. Dreger, 97 Minn. 221, 106 N. W. 904. It follows that the court had no jurisdiction of the offense charged against the relator.

Although the offense charged is a misdemeanor, the penalty is both a fine and imprisonment and the prosecution contends that the municipal court of Crookston had authority to hold an examination and bind the relator over to the district court even if the offense was committed beyond its jurisdiction. We are unable to concur in this view of the law. The authority of the judge of a municipal court to hold an examination where the offense was committed outside his own city is co-extensive with and no greater than that of a justice of the peace.

That a justice of the peace has no authority to hold such an examination where the offense was committed within a city having a municipal court is perhaps made clearer in section 7619, defining the jurisdiction of justices of the peace, than in the section from which we have already quoted. Section 7619 provides: "That no justices of the peace shall have jurisdiction of any offenses committed within the limits of any city or village wherein a municipal court is organized and existing, but such offenses, otherwise cognizable by justices of the peace * * * shall be ex-

amined or tried by the municipal court therein." By providing that justices of the peace shall have no jurisdiction of any offenses committed within such city, and that all such offenses shall be examined or tried by the municipal court therein, the legislature placed such offenses beyond the jurisdiction of such justices for either examination or trial, and likewise placed them beyond the jurisdiction of the municipal court of another city for either purpose.

The order appealed from is reversed.

STATE EX REL. ROBERT H. PEERY v. DISTRICT COURT OF RAMSEY COUNTY AND ANOTHER.¹

March 28, 1918.

No. 20.870.

Judgment - stay until payment of costs in higher court.

The case of Peery v. Illinois Central Railroad Company was tried in the district court and a judgment for plaintiff rendered. This judgment was affirmed by this court, but on a writ of error to the United States Supreme Court, the judgment of this court was reversed, and a judgment for costs rendered against plaintiff. Pursuant to this reversal, this court reversed its former judgment, and the judgment of the trial court, and remanded the case for a new trial. It is held that the trial court had the power to stay proceedings until the judgment for costs in the United States Supreme Court was paid.

Upon the relation of Robert H. Peery the supreme court granted its order directing the district court for Ramsey county and Honorable Hascal R. Brill, presiding judge thereof, to show cause why a writ of mandamus should not be issued commanding him forthwith to vacate a certain order filed by him on November 27, 1917. Respondent made return. Writ discharged.

Samuel A. Anderson, for relator.

Butler, Mitchell & Doherty, Charles C. La Forgee and Walter S. Horton, for Illinois Central Railroad Company.

¹Reported in 166 N. W. 1080.

BUNN, J.

On the petition of relator this court issued an order requiring the district court of Ramsey County, and the Honorable Hascal R. Brill, presiding judge thereof, to show cause why a writ of mandamus should not issue commanding that a certain order in the case of Robert H. Peery v. Illinois Central Railroad Company, be vacated and set aside. The order was one staying all proceedings on the part of plaintiff until he shall have paid the judgment for costs and disbursements, amounting to \$558, rendered in the action in favor of defendant and against plaintiff by the Supreme Court of the United States. Respondent made return to the order to show cause, and the matter was submitted on briefs.

The sole question is whether the district court had the power to make the order stated. A brief history of the case follows:

On the first trial in the district court, in January, 1913, evidence was received on the question whether plaintiff was injured while engaged in interstate commerce. Plaintiff also sought to prove liability under the common law of Kentucky, where the accident happened, but his complaint was held insufficient for this purpose, and he was refused permission to amend, unless he elected to strike out the allegations as to interstate commerce, which he declined to do. The trial court held that plaintiff was not injured while engaged in interstate commerce, that the Federal Employer's Liability Act did not apply, and directed a verdict for defendant. On appeal to this court, the trial court was reversed and a new trial granted. 123 Minn. 264, 143 N. W. 724. This trial resulted in a verdict for plaintiff, based solely on the decision that he was injured while engaged in interstate commerce. This verdict was upheld by this court, and the judgment entered thereon affirmed. 128 Minn. 119, 150 N. W. 382, 1103. Defendant took the case to the United States Supreme Court on a writ of error. That court reversed the judgment of this court, holding that the facts did not establish interstate commerce. judgment for costs was entered in that court in favor of defendant and against plaintiff, for the sum of \$558. The case was remanded to this court for further proceedings, and an order was entered in this court reversing the judgment theretofore entered in the cause in this court, reversing the judgment of the district court which was affirmed by the judgment of this court, and granting a new trial.

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Thereafter defendant endeavored to have taxed as costs in this court the costs in the United States Supreme Court, but the clerk's disallow-ance of this item was affirmed by the court. The judgment for costs in this court was for \$311. Plaintiff afterwards moved that the remittitur be issued without payment of this judgment, except clerk's fees, on the ground of plaintiff's poverty. This motion was denied by this court. Defendant's motion that plaintiff, as a condition precedent to the granting of a remittitur, be required to pay the judgment for costs in the United States Supreme Court, was also denied, on the ground that the statute (G. S. 1913, § 7990), providing that the losing party, except when otherwise ordered by the court, shall pay the costs and disbursements before he shall be entitled to a remittitur, "refers only to costs and disbursements in this court, and this court has no power to impose, as a condition to the granting of a remittitur, the payment of any other sum."

Plaintiff paid the judgment for costs in this court, and the remittitur issued. Then defendant made its motion in the court below, to require plaintiff to give security for costs, and to stay proceedings until the judgment in the United States Supreme Court should be paid. The trial court denied the first part of the motion, but granted the second. This mandamus proceeding was then instituted by plaintiff.

Was it within the power of the trial court to make the payment of this judgment a condition precedent to further proceedings in the action on behalf of plaintiff?

It is well settled that the district court has the inherent power, not dependent on statutory authority, to stay proceedings in an action until a judgment for costs in a former action between the same parties, involving the same subject matter, or in the same action, has been paid, at least where the judgment is in the same court in which the new action is pending. Gerrish v. Pratt, 6 Minn. 14 (53); 1 Notes on Minn. Reports, 186. This is not disputed by counsel for relator. His argument consists of two points: (1) This court, when it held that it had no power to make the payment of the United States Supreme Court judgment a condition precedent to granting a remittitur, held by necessary implication that the district court had no power to make payment of the judgment a condition precedent to proceeding with the new trial; (2)

that this court having remanded the case for a new trial generally, without imposing any condition, the district court violated the mandate of this court when it imposed the condition it did. We will briefly take up these two points in the order stated, and then consider the case generally.

- 1. The order of this court, the effect of which is questioned, was clearly based on the fact that the statute referred to gave this court no power to require payment of any judgments except those entered in this court. It was not intended as a holding that the district court, of original and unlimited jurisdiction, had no power, independent of statute, to require the payment of the judgment as a condition precedent to going on with the new trial. And we do not think this result necessarily follows from the order or anything said in it.
- 2. Under our statute and decisions, when a case is reversed in this court, and a judgment entered here for costs, whether the costs shall be paid as a condition precedent to remitting the case and its further prosecution in the court below, is a question exclusively for this court. Fonda v. St. Paul City Ry. Co. 72 Minn. 1, 80 N. W. 366. It is probably correct under this decision, that when a case is remitted to the court below for a new trial, without conditions, the district court has no power to impose the condition of payment of the judgment in this court. The decision in the Fonda case is predicated solely on the language of the statute, the construction thereof being that whether the costs in this court in any given case shall be paid as a condition precedent to remitting the case and its further prosecution in the court below, is a question exclusively for this court. Counsel cite also Chapman v. Yellow Poplar Lumber Co. 89 Fed. 903, 32 C. C. A. 402; Smith v. Cayuga Lake Cement Co. 105 App. Div. 307, 93 N. Y. Supp. 959; Garrison v. Singleton, 5 Dana (Ky.) 160; Ely v. Commonwealth, 5 Dana (Ky.) 398. But in each of these cases and in the cases cited therein, and in the Fonda case. the appellate court had the power to make the payment of the costs a condition precedent to further proceedings, and had not done so. In the case at bar, the situation is quite different. This court has distinctly held that it had no power to impose the condition, because the statute gave it no such power. Is it true that remanding the case without imposing a condition that the court had no power to impose, makes the

lower court guilty of violating the mandate if it imposes this condition to further proceedings? We think not.

3. Had the judgment been in the court below for the costs of a former trial resulting in a dismissal, there would be no doubt of the power of the court to require payment as a condition precedent to further proceedings. Had the judgment been in this court, for the costs on appeal, if the Fonda case is to be followed, the district court could not make its payment a condition precedent to further proceedings according to the mandate of this court. But in the case at bar we have neither of these situations. The judgment here is in the United States Supreme Court for the costs in that court. It is not claimed that the Federal court had any power to make payment of its judgment a condition precedent to future proceedings in the state trial court. It is settled that this court has no such power. If the district court has not, the power does not exist. We think it does exist, and in the trial court, under its inherent power to do justice, independent of statute. Suppose the judgment for costs had been rendered in some other district court in this state, or in a Federal district court. We perceive no reason to deny the power to refuse to proceed with the second trial until the costs of the first have been paid. It has been held that a stay would not be granted where the first suit was brought in another state or country. Folan v. Larry, 60 Me. 545. But, as stated in Cyc., "it has never been doubted that the rule is in no way affected by the fact that the two actions are brought in different courts, provided the courts are of the same character, that is to say, both being law or both being equity courts." 11 Cyc. 258, and cases cited in note. In Buckles v. Chicago, M. & St. P. Ry. Co. 47 Fed. 424, a leading case which reviews many of the authorities, plaintiff brought his action in the state court, took a nonsuit, and a judgment for costs was taken against him. He brought the action over again in the state court, but it was removed to the Federal court, which granted a stay until the judgment in the state court should be paid. But of course in the case at bar there were not two actions, but a reversal of the judgment and a new trial granted. That some court has the power, on a proper showing, to stay proceedings until the costs on appeal are paid is not open to doubt. It is generally held that the trial court has this power. Felt v. Amidon, 48 Wis. 66, 3 N. W. 825; Clark v. Bay Circuit Judge, 154 Mich. 483,

117 N. W. 1051. It seems to us that the district court had the power in this case to stay further proceedings on the part of plaintiff until he paid the judgment for costs rendered in the Federal Supreme Court. We so hold. This conclusion disposes of the case, as no question of abuse of discretion is or could be involved.

Writ denied.

IN RE PAYMENT PERSONAL PROPERTY TAXES. STATE v. GREAT NORTHERN RAILWAY COMPANY.

April 5, 1918.

No. 20.386.

Railway — gross earnings tax — collection of ad valorem tax — practical construction by state officers.

In a proceeding to enforce personal property taxes against the defendant railway company it is held:

- (1) That certain securities sought to be subjected to an ad valorem tax were owned and used for railway purposes within the gross earnings statute, that they paid a tax when the company paid its gross earnings tax, and that they were not subject to an ad valorem tax.
- (2) That certain other securities, such as stocks and bonds or other indebtedness of corporations, though legitimately acquired and advantageously held by the company in connection with its railway operations, were not owned or used for railway purposes within the meaning of the gross earnings statute, and were subject to an ad valorem tax.
- (3) The securities mentioned in the preceding paragraph have a taxable situs in Minnesota, under the laws of which the defendant is incorporated and in which it has its principal office and place of business and its principal operating and traffic offices, though it has a financial office in New York where it transacts some of its business and though it keeps the securities in New York.
- (4) There has been no practical construction by the administrative officers of the state which prevents the taxation of such property now though not taxed heretofore.

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¹Reported in 167 N. W. 297.

In proceedings in the district court for Ramsey county to enforce payment of personal property taxes remaining delinquent and unpaid on April 1, 1916, defendant interposed an answer which alleged that certain specified bonds and stocks held by it and certain moneys advanced by it to specified railway and other companies, all of which were assessed as taxable on May 1, 1915, constituted property which defendant owned or operated for railway purposes, upon which it paid to the state of Minnesota for the year 1915 a gross earnings tax of over one million dollarsthe same being 5 per cent of its gross earnings derived from the operation of its railway system within the state—and that tax was imposed in lieu of all other taxes upon defendant's property in accordance with Laws 1912, c. 9. The matter was tried before Michael, J., who made findings and ordered judgment in favor of plaintiff for \$19,284.89 as taxes on property specifically mentioned in the findings, and in favor of defendant cancelling the levy of taxes against all other property not specifically mentioned. Plaintiff's motion for amended findings and conclusions or for a new trial was denied. Defendant's motion for amended findings and conclusions or for a new trial was denied. From that part of the judgment unfavorable to it, entered pursuant to the order for judgment, each party appealed. Affirmed on both appeals.

Lyndon A. Smith, Attorney General, Egbert S. Oakley, Assistant Attorney General, Richard D. O'Brien, County Attorney, and Patrick J. Ryan, Assistant County Attorney, for appellant.

Cordenio A. Severance and Erasmus C. Lindley, for respondent.

DIBELL, C.

This is a proceeding against the Great Northern Railway Company to enforce personal property taxes delinquent in Ramsey county. There were findings and judgment determining that certain personal property of the defendant was and other was not subject to ad valorem taxation. The state and the defendant both appeal.

1. The defendant owns stocks, bonds and other corporate indebtedness which the court found constituted property owned and used for railway purposes and not subject to an ad valorem tax. Some of these pieces of property are the same and all are of the same character as that involved in State v. Northern Pacific Ry. Co. infra, page 473, 167 N. W. 294.

That case is controlling. The trial court's holding that it was not subject to an ad valorem tax is sustained.

2. In addition to such securities the defendant owns others which the court held not owned or used for railway purposes within the meaning of the gross earnings statute and therefore subject to an ad valorem tax. It owns stock in a number of townsite companies in Montana and Washington and has made advances to some of them. It owns stock in a coal mine in British Columbia. This was acquired in part to secure a supply of coal for the future and in part to get traffic for the road. It owns the stock of the Somers Lumber Company, a Minnesota corporation having its holdings chiefly in Montana. It acquired the stock for the purpose of insuring a future supply of ties. It made a loan to the company. It is sought to tax the loan but not the stock. It owns bonds of the Northern Land Company which owns the quarries at Sandstone from which it gets traffic. It owns stock in an electric company having a power plant in Washington. It is in prospect that the plant will be developed and the power used in the electrification of the defendant's road. It owns the bonds of a hotel company in Spokane; bonds of an irrigation district in Washington; bonds of a land company; bonds of a city in Washington received in payment for property sold; bonds of the Wisconsin Central Railway Company received in exchange for terminal property, and bonds of the Pillsbury-Washburn Company which it took years ago in payment of freight earned, which the company was unable to pay at the time. The court found that the bonds of the Pillsbury-Washburn Company had been held unreasonably long and had ceased to be working capital and had become an investment.

It is clear that property of the general character indicated, though acquired properly and in the exercise of good business judgment, is not owned or used for railway purposes within the principle of our holdings. County of Todd v. St. Paul, M. & M. Ry. Co. 38 Minn. 163, 36 N. W. 109 (timber lands held for tie and lumber supply not exempt); County of Hennepin v. St. Paul, M. & M. Ry. Co. 42 Minn. 238, 44 N. W. 63 (hotel owned by company and kept by its lessee as a summer resort not exempt though it contributed to travel on road); County of St. Louis v. St. Paul & D. R. Co. 45 Minn. 510, 48 N. W. 334 (wharf leased to coal company not exempt). Though legitimately acquired and advantageously held in

aid of railway operation, or to attract or develop business, it is not property owned or operated for railway purposes within the gross earnings statute. G. S. 1913, § 2226.

The defendant claims, however, that having succeeded to the charter of the Minneapolis & St. Cloud Railroad Company which was created by a special legislative act of the territory of Minnesota, approved March 1, 1856, it is relieved from ad valorem taxation. Laws 1856, p. 294, c. 160. The exemption claimed is founded on Special Laws 1870, p. 308, c. 52, which provides that in consideration of the payment of a gross earnings tax "the road, its appurtenances and appendages, and all other property, estate and effects * * * which they have already acquired or which they may hereafter acquire, purchase, hold, possess, enjoy, or use for, in or about the construction, equipment, renewal, repair, maintaining or operating its railroad, as also the stock and capital of said company, shall be and hereby are forever exempt from all assessments and taxation." Importance is attached to the words "stock and capital." The state for reasons which we need not discuss claims that the defendant has now no special charter exemption but is governed by the general statute. Conceding that the special charter is still effective we are unable to construe the act as more extensive in application than the general statute providing for the gross earnings tax, or than the provisions of various special charters granted from time to time.

We hold that the property was rightly found by the court to be non-railway in character and subject to an ad valorem tax.

3. The defendant is a Minnesota corporation and has its principal office and place of business and its principal operating and traffic office in St. Paul. It maintains an office in New York "where," as the court finds, "a considerale portion of its financial affairs have been directed and transacted." It keeps the evidence of at least a part of its intangible property here involved in New York.

The property under consideration has a taxable situs in Minnesota. It is intangible. The presence of the evidences of it in New York does not prevent its taxation in the state of the domicile of the corporate owner where also the general offices are. See Board v. Hewitt, 76 Kan. 816, 98 Pac. 181, 14 L. R. A. (N.S.) 493; In re Estate of Fair, 128 Cal. 607; 61 Pac. 184; Central R. Co. v. Wright, 124 Ga. 630, 53 S. E.

207; Central R. Co. v. Wright, 166 Fed. 153; Buck v. Beach, 206 U. S. 392, 27 Sup. Ct. 712, 51 L. ed. 1106, 11 Ann. Cas. 732.

4. The court finds that at no time in the past have the administrative officers of the state sought to list property of the character here involved, though the ownership of it has been regularly reported to the Railroad and Warehouse Commission, and that such property has never been assessed. From these facts the defendant argues that there has been a practical construction determinative of taxability. The finding relates to all classes of securities, railway which we hold not subject to an ad valorem tax as well as nonrailway which have no exemption. So far as the securities were railway the officers were right in not taxing. Their omission was in respect of the nonrailway and perhaps in failing to distinguish. In our judgment there has been no such practical construction as prevents taxation. See State v. Northwestern Tel. Exch. Co. 107 Minn. 390, 120 N. W. 534.

The trial court was right in its determination as to all the property involved.

Judgment affirmed on both appeals.

Bunn, J., took no part.

IN RE PAYMENT PERSONAL PROPERTY TAXES.

STATE v. NORTHERN PACIFIC RAILWAY COMPANY.¹

April 5, 1918.

No. 20,387.

Railway — gross earnings tax — stock and debt of foreign corporation not taxable.

In a proceeding to enforce personal property taxes against the defendant railway company it is held:

(1) That certain corporate stocks and bonds and other corporate indebtedness were owned and used by the company for railway purposes within the meaning of the gross earnings statute; and that a tax upon

¹Reported in 167 N. W. 294.

such property is paid in the gross earnings tax and an ad valorem tax cannot be imposed.

(2) That certain stock in a foreign corporation, and an indebtedness owing by a foreign corporation, owned by the defendant, a foreign corporation, having its traffic and operative offices in Minnesota, such stock and indebtedness not being used in Minnesota nor arising from a transaction had there, and held in another state where the defendant has a financial and business office, under the facts detailed in the opinion, had no taxable situs in Minnesota.

In proceedings in the district court for Ramsey county to enforce payment of personal property taxes remaining delinquent and unpaid on April 1, 1916, defendant interposed an answer which alleged that it was a foreign corporation, duly licensed to do business in the state of Minnesota, and certain specified bonds and certificates of stock held by it and certain moneys advanced by it to specified railway and other companies, and the papers evidencing the obligations, all of which were assessed as taxable on May 1, 1915, were kept at the defendant's headquarters in the city of New York, none had ever been kept within the state of Minnesota and none were connected with the business transacted by it in that state; that such securities represented properties and rights necessary and convenient to defendant company in carrying on its transportation business among the states; that all the properties and rights were instrumentalities of interstate commerce and not being located within Minnesota, nor pertaining to business in that state, taxation thereof in Minnesota was a regulation of commerce among the states and imposed an unlawful burden on such commerce contrary to the Constitution of the United States. The matter was heard before Michael, J., who made findings and ordered judgment in favor of defendant. Plaintiff's motion for amended findings and conclusions or for a new trial was denied. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Affirmed.

Lyndon A. Smith, Attorney General, Egbert S. Oakley, Assistant Attorney General, Richard D. O'Brien, County Attorney, and Patrick J. Ryan, for appellant.

Charles W. Bunn and Cordenio A. Severance, for respondent.

DIBELL, C.

This is a proceeding against the Northern Pacific Railway Company to collect personal property taxes delinquent in Ramsey county. There were findings and judgment for the defendant and the state appeals.

The property sought to be taxed consists of corporate stocks and bonds and other corporate indebtedness owned by the company. The trial court held it all nonassessable, either because it was railway property within the gross earnings tax statute or because it was without a taxable situs in Minnesota. The important questions are:

- (1) Whether certain corporate stocks and bonds and other corporate indebtedness were in the sense of the gross earnings tax statute property owned or operated by the company for railway purposes, the tax upon which was paid when the company paid its gross earnings tax, and therefore not subject to an ad valorem tax.
- (2) Whether certain property, not railway property within the meaning of the gross earnings law, had a taxable situs in Minnesota.
- 1. The Northern Pacific system extends from Lake Superior to the Pacific and has various lines and branches in Wisconsin and Minnesota and the states to the west and in Canada. It pays a gross earnings tax in Minnesota. This tax is a tax on the property of the railway owned or operated for railway purposes and is measured under statutory authority subject to constitutional limitations by a fixed percentage of gross earnings. Const. art. 4, § 32a; art. 9, § 1; G. S. 1913, § 2226, et seq. It is still a tax upon the property of the railroad owned or operated for railway purposes so far as within the taxing jurisdiction of the state and not a direct tax on earnings. State v. U. S. Exp. Co. 114 Minn. 346, 131 N. W. 489, 37 L. R. A. (N.S.) 1127 and cases cited; State v. Northwestern Tel. Exch. Co. 107 Minn. 390, 120 N. W. 534; State v. Minnesota Tax Commission, 132 Minn. 93, 155 N. W. 1061; U. S. Exp. Co. v. Minnesota, 223 U. S. 335, 32 Sup. Ct. 211, 56 L. ed. 459. Nothing in the law prevents the imposition of an ad valorem tax upon property not taxed by the gross earnings tax. Whether property is owned or operated as railway property within the sense of the statute often involves a question of fact. City of St. Paul v. St. Paul, M. & M. Ry. Co. 39 Minn. 112, 38

N. W. 925. So far as here a question of fact it is resolved against the state by the findings of the trial court.

The securities sought to be taxed and held not taxable because owned and used for railway purposes need not be enumerated. A reference to a few indicates sufficiently the character of all. The defendant jointly with the Great Northern Railway Company owns a majority of the stock of the Chicago, Burlington & Quincy Railroad Company. Through their stock ownership they exercise a joint control and through trains and traffic pass from the two roads to the large traffic centers on the Burlington route. They have as definite control as if they owned in common. While not a fact important in this litigation it is a conceded one that the control of the Burlington has resulted in a large increase in the gross earnings of the two roads and a consequent increase in revenue to the state. Jointly with the Great Northern it financed the Spokane, Portland & Seattle Railroad Company and the two companies own its stock and bonds. Each company operates its trains over it. Either jointly with the Great Northern, or alone, it has a controlling or substantial interest in the stock or bonds of a number of railroads which are operated as branches or feeders or as terminals for its system. To a considerable extent, and in keeping with common railway practice, it has financed many of these subsidiary companies, taking their stock and bonds, or has acquired control through stock purchases. In connection with the Union Pacific it aided the construction of a fruit storage warehouse in the Yakima Valley in Washington and took bonds of the warehouse company. The warehouse serves the two companies and is a facility proper to be furnished in connection with railway transportation and is so used.

The various railroads to which the securities pertain are integral parts of the railway system of the defendant. They were not acquired and are not held for investment. They were acquired and are kept that the company may have the use for railway purposes of the physical property to which they pertain.

In determining whether these items of property are railway or non-railway, substance and not form controls. Stock ownership does not give title to the corporate property but majority ownership gives control and ownership of less may be effective. State v. Chicago & N. W. Ry. Co. 133 Minn. 413, 158 N. W. 627, L. R. A. 1916E, 1288, and cases cited;

Minneapolis C. & C. Assn. v. Chicago, M. & St. P. Rv. Co. 134 Minn. 169. 158 N. W. 817; Minneapolis C. & C. Assn. v. Great Northern Rv. Co. 137 Minn. 10, 162 N. W. 689, 163 N. W. 294; Pearsall v. Great Northern Ry. Co. 161 U. S. 646, 16 Sup. Ct. 705, 40 L. ed. 838; U. S. v. Union Pac. R. Co. 226 U. S. 61, 33 Sup. Ct. 53, 57 L. ed. 124; U. S. v. Delaware, L. & W. R. Co. 238 U. S. 516, 35 Sup. Ct. 873, 59 L. ed. 1438. The statutes of the state, and railway statutes generally, authorize the acquisition for railway purposes of stocks and bonds. An investment is not intended but a use for railway purposes. If the company had acquired another road or branch or feeder or terminal, or an undivided interest, or a right to use, by direct purchase, it would satisfy the tax demands of the state when it paid its gross earnings. Here the situation is hardly different if we go to the substance of things; and it is clearly not of consequence that the control is not several but joint, or even that it is not joint, if through the securities the company in a practical way adds a railway operation to its system. No case controlling in its facts is found. Upon some of the features of the case State v. St. Paul Union Depot Co. 42 Minn. 142, 43 N. W. 840, 6 L.R.A. 234, is interesting. We hold with the trial court that taxes were paid on property of the character described when the company paid its gross earnings and that it is not subject to an additional ad valorem tax. The question presented and discussed is one of interest but not of doubt.

2. The defendant owns stock of the Colorado & Southern Railway Company which was purchased as an investment. It owns an indebtedness of the Ruth Realty Company, an Oregon corporation, apparently evidenced by notes. This indebtedness arose through an advance made by the railway company to aid the realty company in holding certain lands which the railway company had in view for future acquisition for terminals. The defendant does not claim that either of these items is exempt from an ad valorem tax because devoted to railway uses; but it claims that neither has a taxable situs in Minnesota. The trial court found that there was not a taxable situs in the state.

The defendant is a Wisconsin corporation. The Superior & St. Croix Railroad Company was incorporated by the legislature of that state by P. & L. Laws 1870, c. 326. The charter was several times amended and the last time by Laws 1895, c. 244. In 1896 its name was changed by

corporate action to Northern Pacific Railway Company. It acquired at foreclosure sale the properties of the Northern Pacific Railroad Company which was chartered by Congress in 1864. It has filed its charter with the secretary of state of Minnesota and is licensed to do business in the state. Its general traffic and operative office is in St. Paul. From there its general operative and traffic business is conducted though it has other centers of operative activity and direction in states to the west. It has an office in New York. Its corporate books and its corporate seal and the office of its secretary and other executive offices are there. Its stockholders and directors and executive committee meet there. Its general financial and railway policy is determined there and the corporate acts usually had in the state creating the corporation are executed there. All of its securities are kept there. It has bank deposits there. None of the meetings of its stockholders or directors are held in Wisconsin. It has no general office there. It does no business there except that connected with its line of railroad extending from Superior. Aside from this it has only such connection with Wisconsin as the laws of the state require of a corporation which it creates.

The Colorado Southern and the Ruth Realty Company are foreign corporations. Neither has a place of business or transacts business in the state. Neither the stock nor the indebtedness sought to be taxed was ever used in Minnesota. Neither piece of property comes from any transaction had in Minnesota. Neither has any connection with the operative or traffic business of the company. Neither has been given a business situs in the state by the company within such cases as In re Jefferson, 35 Minn. 215, 28 N. W. 256, Bristol v. Washington County, 177 U. S. 133, 20 Sup. Ct. 585, 44 L. ed. 701, and innumerable others of like character. If dividends are paid on the stock or interest on the indebtedness they will be received in New York and used or reinvested there, and, if the stock is sold or the indebtedness paid, payment will be made there and the disposition of the proceeds will be determined there.

The question of taxable situs is often a vexing one and it is particularly so where the corporation sought to be taxed has its statutory domicile in one state, with which its connection is nominal, and definite physical locations and extensive business and industrial operations in others, and in another a business location where its policy is determined

and its financial operations are conducted and its corporate acts usual to the state of its creation are executed. The notion that personal property follows the owner and that his domicile fixes the taxable situs of his intangible property is a fiction which yields to fact and to practical considerations of justice in taxation and the owner by the use to which he puts his property may give it a location elsewhere. Metropolitan Life Ins. Co. v. City of New Orleans, 205 U. S. 395, 27 Sup. Ct. 499, 51 L. ed. 853. The owner of stock in a foreign corporation is subject to taxation in the state of his residence if the state chooses to tax it. Hawley v. City of Malden, 232 U.S. 1, 34 Sup. Ct. 201, 58 L. ed. 477, Ann. Cas. 1916C, 842. The fact of residence of the owner is not a negligible one in determining the place of taxation of intangibles. That is the natural place of taxation. Situs can be fixed in Minnesota only because the company has its general operative and traffic offices there. All other facts affecting situs, and they have been enumerated in some detail, negative the existence of situs in Minnesota. A review of the cases, which are numerous and variant in their facts, would not be attended with profit. See 15 Columbia Law Rev. 377; 16 Columbia Law Rev. 137; note to Liverpool & Co. v. Board, 221 U. S. 346, L.R.A. 1915C, 903, 914-944; 1 Cooley, Tax. 658; Gray, Lim. Tax. §§ 85-100; Beale, Foreign Corp. § 501, et seq.

The state cites State v. Northern Pacific Ry. Co. 95 Minn. 43, 103 N. W. 731. It was there the opinion of the court that a land contract for the sale of land partly in Minnesota and one for the sale of land in North Dakota had a taxable situs in this state. From the syllabus and from the cases cited it seems that the view was that a situs had been given them in the state within such cases as In re Jefferson, 35 Minn. 215, 28 N. W. 256, and like cases. The question mostly considered was a different one. The records in the two cases are entirely unlike and the case is not controlling.

Conceding that a corporation might so abandon the state which created it and so engage its activities in another state that the situs of all its intangible property for purposes of taxation would be referred to the latter, though not localized there for actual use, the record does not put the situs of the stock and indebtedness under consideration in Minnesota. We reach the conclusion that with the facts as we have stated

them, and as found by the trial court, the stock of the Colorado Southern and the debt owing by the Ruth Realty Company have no taxable situs in the state. This accords with the trial court's view.

Judgment affirmed.

Bunn, J., took no part.

CHARLES F. DEZURIK v. HENRY W. IBLINGS AND OTHERS.

EDWARD CARLSON v. HENRY W. IBLINGS AND OTHERS.

NICKOLAI H. WELTZIN v. EMMA L. HANSCOM AND OTHERS.

April 5, 1918.

No. 20,700.

Foreclosure of mechanic's lien — appointment of receiver.

In an action to foreclose a mechanic's lien, a receiver may be appointed to take possession of, lease or otherwise handle the property, for the benefit of all the parties, under the direction of the court, upon a petition of one of the lien claimants, where a sale has been had and confirmation thereof denied, asking that a receiver be appointed to sell and dispose of such property, and to take charge and handle the same under the direction of the court.

Three actions in the district court for Hennepin county to enforce mechanics' liens. They were consolidated and tried together before Molyneaux, J., who made findings and ordered judgment in favor of the several lien claimants and directing a sale of the premises to satisfy the liens, subject only to a mortgage in favor of the Massachusetts Mutual Life Insurance Company and the sheriff's certificate issued upon foreclosure of the same. From an order appointing a receiver of the premises, defendant Webster Lumber Company appealed. Affirmed.

A. R. Chesnut and H. Stanley Hanson, for appellant.

John A. Nordin and Arthur H. Anderson, for respondent.

¹Reported in 167 N. W. 116.

QUINN, J.

Appeal from an order appointing a receiver under the provisions of Section 7034, G. S. 1913, to take charge of, lease and handle real property.

Three actions were brought to foreclose certain mechanics' liens for labor and material furnished for the erection of a dwelling upon the premises in question in 1914, which were vacant and unoccupied prior to that time. The cases were consolidated and tried as one. There were 24 lien claims involved. The trial resulted in the allowance of all the claims which were decreed a lien upon the premises, subject and second only to a mortgage in favor of the Massachusetts Mutual Life Insurance Company for \$6,000. January 6, 1916, judgment was entered in accordance with such findings and decree.

The mortgage referred to was foreclosed and the property sold and bid in by the mortgagee for \$6,058, and on May 31, 1915, a sheriff's certificate, in due form, was issued to the insurance company. Prior to the expiration of the time of redemption from the mortgage foreclosure sale, appellant and several others of the lien claimants filed notices of intention to redeem. On June 5, 1916, appellant Webster Lumber Company, as a judgment creditor, redeemed the property from such sale, pursuant to its notice of redemption, paying therefor the sum of \$7,120-.42, and the sheriff issued his certificate of redemption to the appellant.

April 21, 1917, the premises were sold by the sheriff under the lien judgment for the full amount thereof and were bid in in the name of the lien claimants as tenants in common. May 5, 1917, the sheriff's report of sale came up for confirmation, when the defendants Webster Lumber Company and the Minneapolis Plumbing Company appeared and objected to the confirmation, upon the ground that they had never authorized anyone to bid on the property in their behalf. On June 8, 1917, the court filed its order denying the confirmation and vacated the sale.

June 23, 1917, defendant Day Brothers petitioned for the appointment of a receiver of the property under section 7034 of the statute, to sell and dispose of the same and apply the proceeds in payment of the respective liens, save that of the Webster Lumber Company, and to take

charge and handle the said property under the order and direction of the court. August 3, 1917, the court filed its order appointing Arthur H. Anderson as receiver of the property to take possession of and to lease or otherwise handle the same in the interest and for the benefit of all concerned, and, according to their respective rights, to collect the rents and retain the same until authorized by order of the court to pay the same to the parties entitled thereto.

Section 7034 of the statute referred to provides: "If in any case the sale be not confirmed, the court may direct a resale, or, if deemed best, may appoint a receiver to lease or otherwise handle the property under its direction, in the interests of all persons concerned."

The appellant assigns as error: (1) That the court erred in assuming jurisdiction of the motion; (2) in appointing a receiver of the property; (3) in granting relief not asked for in the moving papers.

In support of its assignments of error the appellant contends: That the statute specifically provides the remedies where an order has been made denying confirmation of a mechanic's lien foreclosure sale; that the instant case comes within the statute, and the only remedies which the court can give are the two specified therein, viz., either to direct a resale or to appoint a receiver to lease and otherwise handle the property, under the direction of the court, in the interests of all the parties.

Appellant urges that, the notice of motion and moving papers ask for a remedy other than those specified in the statute, viz., for the appointment of a receiver "to sell and dispose of," and that such a petition is insufficient to give the court jurisdiction or to authorize the appointment of a receiver. In this we think the appellant is in error. The moving papers, as we read them, go beyond that contended for by appellant. While it is true that relief which the statute does not authorize is asked for in the moving papers, yet, in addition thereto, the very relief granted by the court was also asked for. The notice of motion asks for the appointment of a receiver "to sell and dispose of," but it also asks for a receiver "to take charge and handle the said property under the order and direction of the court." Under the latter provision, we think the court had jurisdiction and was authorized to appoint a receiver for the purposes specified in its order.

Subsequent to the completion of the dwelling, appellant obtained a quitclaim deed to the premises in question from the owner thereof. Whether this deed was absolute or conditional does not appear, nor does it appear what interest in the premises appellant acquired through the redemption certificate from the mortgage foreclosure sale. These matters cannot be determined upon a motion for the appointment of a reciever under the statute. The order appealed from is affirmed.

ANDREW McCORMICK v. GEORGE O. ROBINSON AND OTHERS CHARLES D. CAMPBELL v. SAME.¹

April 5, 1918.

Nos. 20,720, 20,721.

Action begun by delivery of summons to officer - statute.

1. An action is deemed as begun for all purposes when the summons is delivered to the proper officer for service if such service be completed within the time prescribed by law.

Same - amendment as to defendant.

2. Where an action is brought against a person in one capacity, an amendment by which it is continued against him in a different capacity does not bring in a new party nor begin a new action but merely changes the capacity in which he is sought to be held, and the beginning of the action will date from the time it was originally begun regardless of the time when the amendment was made.

State action entitled to priority.

3. In the present case the state action was begun before the commencement of the Federal action and is entitled to priority.

Action in the district court for St. Louis county to wind up a partnership, for an accounting and for a conveyance of land alleged to be held in trust by certain defendants for plaintiff. The history of the litigation will be found in the second and third paragraphs of the opinion.

¹Reported in 167 N. W. 271.

From an order, Cant, J., denying defendants' motion for an order abating the action until the final determination of another action in the United States district court in which Margaret B. Fowler and others were plaintiffs and Andrew McCormick was one of the defendants, defendants appealed. Affirmed.

A. L. Agatin, John G. Williams, Frank D. Adams, G. W. Morgan and Davis, Severance & Olds, for appellants.

Fryberger, Fulton & Spear, for respondent.

TAYLOR, C.

Plaintiff claims an interest in an iron mine in St. Louis county which is being operated by the Minnesota Iron Company under a mining leaso from the fee owners. He brought this action to establish his interest in the mine and made the fee owners and the Minnesota Iron Company defendants.

The iron company is a Minnesota corporation, but all the fee owners are nonresidents. For the purpose of beginning his action, plaintiff filed his complaint in the office of the clerk of the district court of St. Louis county on August 9, 1916, and on the same day delivered the summons to the sheriff of that county for service. On August 10, 1916, the sheriff made a return of "not found" as to the defendants other than the iron company. On August 16, 1916, plaintiff filed an affidavit for publication of the summons and on the following day began publishing the summons. Both the affidavit for publication and the publication were defective and were subsequently set aside as hereinafter stated. On September 26, 1916, the fee owners, appearing specially for that purpose, presented a petition for removal of the case to the United States district court and it was transferred to that court. A motion to remand the case to the state court was argued and submitted on October 14, 1916, and an order remanding it was filed on November 20, 1916. While the case was in the United States court, the fee owners made a motion to set aside the service of the summons upon them, on the ground that the affidavit for publication and the publication were fatally defective, but the court remanded the case without deciding this motion. They renewed the motion in the state court, and on December 26, 1916, that court made an order setting aside the affidavit for publication and the

publication of the summons as fatally defective. On November 20, the same day on which the case was remanded to the state court, plaintiff delivered a duplicate summons to the sheriff for service who served it upon the Minnesota Iron Company, but again made a return of "not found" as to all the other defendants. Immediately thereafter plaintiff filed a new affidavit for publication and again published the summons, and this affidavit and publication are conceded to be in proper form in all respects.

After the motion to remand had been made but before it had been decided, and on November 9, 1916, the fee owners began an action in equity in the United States court against plaintiff involving the same subject matter and the same issues which are involved in the present action and caused personal service to be made upon him on that date. In their answer in the present action the defendants alleged the commencement and pendency of the action in the United States court, and thereafter made a motion to abate the action in the state court or to stay proceedings therein until the termination of the action in the United States court, on the ground that the action in the United States court was commenced and pending before the action in the state court was commenced. This motion was denied and defendants appealed from the order denying it.

1. The action in the Federal court was commenced on November 9, 1916, by filing the bill of complaint and serving the subpoena upon the defendants therein personally on that date. In the state court the complaint was filed and the summons delivered to the sheriff for service on August 9, 1916, but the service of the summons was not completed by a proper publication thereof until after the commencement of the Federal action. If the state action was commenced when the summons was delivered to the sheriff for service, it is first in point of time and entitled to priority; if it was not commenced until the service of the summons had been completed by a proper publication thereof, the Federal action is first in point of time and entitled to priority. Defendants contend with much earnestness and ability that under our statutes and the decisions of this court an action is not deemed commenced, except for the purpose of avoiding the bar of some period of limitation, until the summons has been served upon the defendant.

Three sections of the code of civil procedure bear upon the question: "Civil actions in the district court shall be commenced by the service of a summons as hereinafter provided." G. S. 1913, § 7728.

"For the purposes of this subdivision, an action shall be considered as begun against each defendant when the summons is served on him, or on a codefendant who is a joint contractor or otherwise united in interest with him, or is delivered to the proper officer for such service; but, as against any defendant not served within the period of limitation, such delivery shall be ineffectual, unless within sixty days thereafter the summons be actually served on him or the first publication thereof be made." G. S. 1913, § 7707.

"The court shall have jurisdiction of the defendant from the time of the service of the summons or other process upon him, and service by published notice shall be deemed complete at the expiration of the prescribed period of publication. A voluntary appearance by the defendant shall be equivalent to personal service, unless the same be made for the sole purpose of attacking the jurisdiction." G. S. 1913, § 7741.

Section 7728 provides the method for commencing an action and bringing the defendant into court, but this method is not exclusive, for the defendant may appear voluntarily and in that event service of the summons is not required. Section 7741 provides that the court shall have jurisdiction of the defendant from the time of the service of the summons upon him. Section 7707 provides that an action shall be deemed begun against a defendant when the summons is delivered to the proper officer for service upon him; but further provides that unless service be made before the expiration of the period of limitation within which the action must be begun, such delivery shall not constitute a beginning of the action, "unless within sixty days thereafter the summons be actually served on him or the first publication thereof be made."

This section contemplates that the beginning of the action shall date from the delivery of the summons to the proper officer for service in two classes of cases: Those in which either actual or constructive service of the summons is made before the expiration of the period of limitation within which the action may be begun; and those in which neither actual nor constructive service of the summons is made within such period of limitation, but in which the summons is either served or the first publica-

tion of it is made within 60 days after its delivery to the officer. Defendant's contention would entirely eliminate the first class of cases. We gave this statute careful consideration in Bond v. Pennsylvania R. Co. 124 Minn. 195, 144 N. W. 942, and reached the conclusion that where the provisions of the statute were complied with, the action was deemed begun when the summons was delivered to the proper officer for service, not merely for the purpose of avoiding the bar of the statute of limitations, but for all purposes. Defendants insist that this holding is in conflict with prior decisions, but an examination of the cases cited will disclose that the question here presented was not involved or decided in any of them. The distinction between the cases in which actual or constructive service of the summons was made within the period of limitation, and the cases in which such service was not made within such period but was made within 60 days after its delivery to the officer, was created by the change in the statute made in the revision of the laws in 1905. Prior to the revision of the laws in 1905, the beginning of the action did not date from the delivery of the summons to the officer for service in any case, unless such delivery was "followed by the first publication of the summons, or the service thereof, within sixty days." R. S. 1851, c. 70, § 15; G. S. 1866, c. 66, § 14; G. S. 1894, § 5144. This fact should be borne in mind in considering the early cases upon which defendants rely. In Crombie v. Little, 47 Minn. 581, 50 N. W. 823, it was claimed that a service by publication was fatally defective, but the court held that the statutory requirements had been complied with and that the service was valid. In Smith v. Hurd, 50 Minn. 503, 52 N. W. 922, an action to foreclose a mechanic's lien, no service was made upon nonresident mortgagees until more than a year after the time for bringing the action had expired. It was held that this service was too late and that service upon the resident defendants was not a service upon these mortgagees. In H. L. Spencer Co. v. Koell, 91 Minn. 226, 97 N. W. 974, it was held that the action was not commenced until the summons had been served upon the defendant, but while the point was not raised or discussed it appears that the summons was delivered to the sheriff more than a year before the first publication of it, hence the provision in question did not apply, and was not invoked. In Seeger v. Young, 127 Minn. 416, 149

N. W. 735, the question was whether an action in which the defendant had appeared and answered was still pending so as to be a bar to a subsequent suit.

The question as to whether the delivery of the summons to the sheriff constituted the beginning of the action where such delivery was followed by service of the summons within the prescribed time thereafter, was neither raised nor considered in any of these cases; but the court in the course of its discussion made obiter statements to the effect that except for the purpose of avoiding the statute of limitations the action was begun by the service of the summons upon the defendant. In these cases the court had no occasion to consider or determine the effect of the provision here in question, and the language used cannot be considered as a judicial determination that this provision applied only to cases involving the statute of limitations. Whatever doubt may previously have existed seems to have been put at rest by the change in the statute made in 1905, for the statute as it now reads is clearly applicable to cases in which the statute of limitations is not involved.

Where service is made within the period of limitation, the statute does not limit the time within which delivery of the summons to the officer shall be followed by service thereof in order to have such delivery constitute the beginning of the action; but this does not mean that a plaintiff can deliver his summons to the officer and then wait indefinitely before doing anything more. To have the action deemed begun when the summons is delivered to the officer, the plaintiff must proceed with reasonable diligence to effect service within a reasonable time thereafter. In the present case plaintiff proceeded with reasonable diligence under the circumstances disclosed by the record.

2. Title to an undivided interest in the property was vested in certain of the defendants as trustees, but in the original summons and complaint they were named as defendants in their individual capacity and not in their capacity as trustees. After the commencement of the action in the Federal court, but before the making of the motion to stay proceedings in the state court, the proceedings in the state court were amended by making these trustees parties in their capacity as trustees. Defendants insist that the state action cannot be deemed begun against these de-

fendants in their capacity as trustees until this amendment was made, and that the Federal action, having been begun as to all parties before the making of this amendment, is entitled to precedence.

It is well settled that where an action is brought against a person in one capacity, an amendment by which it is continued against him in a different capacity does not bring in a new party nor begin a new action but "merely changes the capacity in which the same person is sought to be charged;" and, as there is no change in the person sought to be charged but merely in the capacity in which he is sought to be held, that the beginning of the action will date from the time it was originally begun regardless of the time when the amendment was made. In Boyd v. U. S. Mortgage Co. 187 N. Y. 262, 79 N. E. 999, 9 L. R. A. (N. S.) 399, 116 Am. St. 959, 10 Ann. Cas. 146, it is said in the syllabus: "Where the summons and complaint in an action brought before the running of the statute of limitations are so amended after the running of the statute as to show that the defendant is sued individually instead of in a representative capacity, the amendment does not bring in a new party defendant, but merely changes the capacity in which the same defendant is sought to be charged, and therefore the defendant cannot contend that the action is barred by limitation." This decision contains an exhaustive discussion of the authorities bearing upon the question, and the report of the case in 10 Ann. Cas. 146 is followed by a note in which many other authorities are collated. To the same effect is Morrison County L. Co. v. Duclos, 131 Minn. 173, 154 N. W. 952.

The same questions presented to this court were presented to the Federal court upon an application to enjoin plaintiff from prosecuting his action in the state court until the termination of the action in the Federal court, and the injunction was denied on the ground that the state action was begun before the Federal action and was entitled to precedence. We concur in the conclusion reached by the Federal court and the district court, and the order appealed from is affirmed.

JAMES B. BRADSHAW AND ANOTHER v. J. G. SIBERT.1

December 14, 1917.

No. 20.646.

Guaranty - law of the case.

On a second trial the evidence did not change the material facts or qualify defendant's liability as expressed in the written contract. The decision on the former appeal is therefore followed. [Reporter.]

After the former appeal reported in 134 Minn. 186, 158 N. W. 830, the case was tried upon stipulated facts before Catherwood, J., who made findings and ordered judgment in favor of plaintiffs for \$200.10 and interest. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

Henry A. Morgan, John F. D. Meighen and Bennett O. Knudson, for appellant.

David R. Thomas, for respondent.

PER CURIAM.

This cause was before the court on a former appeal. 134 Minn. 186, 158 N. W. 830. It was then held that the contract involved in the action was a continuing guaranty, subjecting defendant to liability in the sum of \$400. On a second trial of the action the letter referred to in the former opinion was received in addition to the evidence as it appeared on the first appeal. We are of opinion that the letter in no way changes the material facts, or in any way qualifies defendant's liability as expressed in the written contract, and the former decision is therefore followed as the law of the case.

Judgment affirmed.

¹Reported in 165 N. W. 1074.

FRED L. STEVENS v. JOHN E. FRITZEN.1

October 8, December 14, 1917.

No. 20,672.

Appeal and error - striking out settled case - termination of stay.

Under G. S. 1913, § 7832, the court has power to extend the time limited for proposing and settling a case and to grant leave to propose a case after the time limited has expired. That attorneys attempted to serve the proposed case after the time limited had expired and before they obtained leave to do so is not controlling. Motion to strike the settled case from the record denied. [Reporter.]

Action in the district court for St. Louis county to recover \$148 upon a promissory note. The answer alleged that defendant conducted a small grocery store and the agent of Donald-Richard Company represented to him it wished to place and display in his store a case of perfumes and toilet articles; that all the statements of the agent in regard to the printed paper which defendant was asked to sign were false and were made for the purpose of inducing him to sign it; that the goods subsequently delivered were not according to the sample exhibited but were in fact worthless trash. On information and belief defendant alleged the promissory note was part of the paper signed by him and that subsequently it was cut or detached from the contract in such way as to leave no part of the contract but the naked allegations of the note; that he returned to Donald-Richard Company all of the merchandise except a few bottles which defendant had already sold to customers for \$7.75. The answer also alleged that plaintiff took the note with knowledge of all the facts set up in the answer and for the purpose of depriving defendant of his defense against the payment of the note. The case was tried before Ensign, J., who at the close of the testimony granted plaintiff's motion for a directed verdict. Defendant's motion for judgment nothwithstanding the verdict or for a new trial was denied. From the judgment entered pursuant to the order for judgment, defendant appealed. Reversed and new trial ordered.

Courtney & Courtney, for appellant. Stearns & Hunter, for respondent.

The following opinion was filed on October 8, 1917:

¹Reported in 164 N. W. 365, 165 N. W. 1073.

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PER CURIAM.

Motion to strike the settled case from the record. The facts are as follows: There was a directed verdict for plaintiff. A motion for a new trial was denied March 1, 1917, and the order served on defendant's attorneys on the same day. March 9 it was stipulated that proceedings be stayed until March 23. Judgment was entered on March 24. July 25 defendant moved for a rehearing of the motion for a new trial, and asked an order reinstating and extending the stay. This motion was heard on the afternoon of July 30 and denied. On the morning of that day defendant's attorneys served on the attorneys for plaintiff a proposed case, but admission of service was refused because the time had expired. On August 13 defendant procured and served on plaintiff's attorneys an order to show cause why the time within which defendant might propose and settle a case should not be extended, and why the case theretofore presented should not be settled. There was a hearing on this order to show cause on August 15, and on the same day the court made an order granting the relief asked.

Plaintiff's attorneys claim that because defendant failed to ask leave to serve a proposed case before he attempted to make the service, the court had no power to make the order of August 15, extending the time and settling the case theretofore proposed. They cite Van Brunt & W. Mnfg. Co. v. Kinney, 51 Minn. 337, 53 N. W. 643. There can be no doubt that the court had the power under G. S. 1913, § 7832, to extend the time limited for proposing and settling a case, and to grant leave to propose a case after the time limited had expired. We do not see that the order made was anything more than an exercise of the statutory power thus granted. It is not controlling that the proposed case was actually served before leave to do so had been obtained.

It is not argued that there was any abuse of discretion, and we see none. The motion is denied.

The following opinion was filed on December 14, 1917:

PER CURIAM.

The identical contract involved in this action, except as to one of the parties, and the methods by which it was procured, were before us in the case of Stevens v. Pearson, 138 Minn. 72, 163 N. W. 769. We there held that the evidence justified the jury in finding that the contract was procured by fraud, that plaintiff was not a bona fide holder, and that defendant was not negligent in signing the same. The facts in this case, as disclosed by the evidence, cannot be differentiated in point of substance from those there before the court, and we follow and apply that decision. It was error therefore to direct a verdict for plaintiff; the questions involved should-have been submitted to the jury.

Judgment reversed and new trial ordered.

FRANK T. TRENDA v. TOWN BOARD OF WHEATLAND.1

December 21, 1917.

No. 20,674.

Highway - evidence - new trial.

Petition for laying out road denied by town board. On appeal to the district court the jury reversed the order of the board. On appeal by town board, held: (1) The evidence supported the verdict; (2) the court did not err in excluding a remonstrance against the road signed by many free-holders; and (3) the court did not err in denying a new trial because of cumulative evidence newly discovered. [Reporter.]

Frank T. Trenda and others petitioned the board of supervisors of the town of Wheatland for a new road. From an order of the board denying the petition, Trenda appealed to the district court for Rice county where the appeal was tried before Childress, J., and a jury which reversed the decision of the board of supervisors. From an order denying its motion for a new trial, the town board of Wheatland appealed. Affirmed.

James P. McMahon, for appellant. Charles C. Kolars, for respondent.

PER CURIAM.

A petition, in due form, signed by 34 legal voters of the town of Wheatland, in Rice county, owning real estate therein and within three miles of the proposed highway, was filed in the office of the town clerk of that town, asking the town board to lay out and establish a new road 4 rods wide in said town. A time for hearing the petition was fixed, due notice given, a hearing had, and the prayer of the petition denied. Frank T. Trenda, who was one of the petitioners, appealed to the district court from the order of the town board. The appeal was tried to a jury, and a verdict rendered to the effect that the order of the town board refusing to lay out the highway be reversed and the highway laid out and established. From

In its motion for a new trial, appellant sets forth 4 grounds why a new trial should be granted: (1) That the verdict is not justified by the evidence; (2) error in excluding the remonstrance from the evidence; (3) misconduct of counsel for respondent; (4) newly discovered evidence.

an order denying its motion for a new trial the town board appealed.

1Reported in 165 N. W. 472.

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It is not disputed but that the proposed highway would connect two section line roads, and that it would afford an outlet to farms now having no highway. There is a wide range in the testimony as to the cost of establishing and putting the highway in condition for travel. The appellant offered testimony to the effect that the cost would exceed \$12,000, while the respondent offered proofs that it would not exceed \$3,000.

The question of public necessity and the feasibility of the undertaking was submitted to a jury, and there was ample testimony to support the verdict. Upon the trial appellant offered in evidence a so-called remonstrance against the establishing of the highway signed by numerous freeholders of the town, which, upon objection, was excluded. The ruling was right. The offer was not competent for any purpose.

We have examined the record with care, and find nothing that suggests impropriety on the part of counsel for respondent during the trial. The newly discovered evidence referred to in the numerous affidavits, if admissible in evidence, would be but cumulative at best, and there was no error in denying a new trial upon that ground.

Affirmed.

INA B. MOSCRIP v. GREAT NORTHERN RAILWAY COMPANY.1

December 21, 1917.

No. 20.689.

Damages - corrected verdict sustained.

Action for personal injury. Verdict for \$9,000 reduced to \$6,000 by the trial court. Evidence that the right hip was entirely free of skin and muscle-covering for a space of 5x4 inches and it was necessary to graft skin upon it; that the fat and skin between the legs were badly discolored; that the little finger of the right hand was broken and the muscles of the hand torn; that he had other injuries; that plaintiff remained in precarious condition for 3 days and in the hospital for nearly 5 months. Held: There was no ground for reversing the verdict. [Reporter.]

Action in the district court for Lyon county by the guardian ad litem of George R. Moscrip to recover \$25,000 for injuries received by the minor while in defendant's employ. The answer alleged that Moscript assumed the risks in-

1Reported in 165 N. W. 1074.

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cident to the employment. The case was tried before Olsen, J., and a jury which returned a verdict in favor of plaintiff for \$9,000. Defendant's motion for judgment notwithstanding the verdict was denied. Its motion for a new trial was granted, unless plaintiff consented to a reduction of the verdict to \$6,000. From the order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

M. L. Countryman, A. L. Janes and J. H. Hall, for appellant.

Tom Davis and Ernest A. Michel, for respondent.

PER CURIAM.

This is an action to recover for personal injuries caused by the negligence of the defendant railway company. The jury returned a verdict for the plaintiff for \$9,000. The trial court denied defendant's motion for judgment notwithstanding the verdict, but granted its motion for a new trial, unless plaintiff file his consent to the reduction of the verdict to \$6,000. Plaintiff filed his consent to the reduction, and defendant appealed.

The sole question presented upon this appeal is: Was the verdict, as reduced by the trial court, excessive.

Plaintiff was injured on July 27, 1916. He was immediately removed to a hospital where he remained, barring three days, until December 23. He was under the constant care of Dr. Branton, who testified, in effect, that:

The skin and covering of the muscles of the right hip to the extent of about 5 or 51/2 Inches one way and about 4 inches the other way, was denuded, that is, it was entirely free, off of the hip. There were scratches, some places deeper than others, on the abdomen. Down between the legs in the soft tissues, the fat and skin were badly discolored. There was a deep hole, about as large around as the end of my little finger about a third of the way down the leg. On his right hand the little finger was broken just below the second joint and there was a deep tear through the muscles of the hand. The skin back of the right ear was torn. He remained in a very precarious condition, in a very grave condition for about 3 days. He bled considerable, which with the shock, made us fear there might be internal injuries. It was impossible for him to pass his urine, and we used a small rubber tube and we had to pass the catheter a number of times a day for 3 or 4 days, but he complained for 2 or 3 months. I found he had a stricture. After he had been in the hospital awhile, it became necessary to graft skin onto the wound on his hip. This was done in August.

Doctors Kerns and Thoraldsen each testified that he had a stricture and that it was permanent and that he had an injury to his back and sacroiliac joint and to his kidneys.

The trial judge, apparently, gave the matter of the injuries and the amount of the verdict careful consideration. He had a superior opportunity

of determining the question of damages and nothing has been presented which would justify this court in holding that the trial court was in error in this respect.

Affirmed.

A. C. JEFFERSON v. A. GUTHRIE COMPANY.1

January 18, 1918.

No. 20,729.

Sale — implied warranty — evidence.

Action for price of merchandise. Counterclaim for breach of implied warranty. Finding in favor of plaintiff. *Held*: The cause of shrinkage of the lumber was a question of fact for the trial court and the evidence will not warrant reversing the finding. [Reporter.]

Action in the municipal court of St. Paul to recover \$174.90 for maple flooring sold and delivered. The facts are stated in the opinion. The case was tried before Finehout, J., who made findings and ordered judgment in favor of plaintiff for the amount demanded. From an order denying its motion for amended findings or a new trial, defendant appealed. Affirmed.

Barrows & Stewart, for appellant.

George B. Spencer, for respondent.

PER CURIAM.

Action to recover the agreed price of a quantity of maple flooring sold and delivered by plaintiff to defendant. Defendant admitted the sale, and nonpayment of the price, but interposed a counterclaim based on allegations of an implied warranty that the flooring was kiln dried, and a breach of this warranty which made it necessary for defendant to take up the flooring after it had been laid, and relay it, at an expense exceeding the agreed price of the lumber. The case was tried before the court without a jury, and a decision rendered in plaintiff's favor. The court found on the evidence that the flooring delivered was kiln dried, and first-class material. Defendant moved for amended findings and for a new trial. The motion was denied, and this appeal taken.

It is admitted that the flooring shrunk after it was laid, which was im-Reported in 165 N. W. 1074. mediately on its delivery, and that it was necessary to relay it. The cause of this shrinkage, whether it was that the lumber was not kiln dried, or some cause for which plaintiff was not responsible, was a question of fact for the trial court. We have examined the evidence, and are unable to say, conceding that there was an implied warranty, that the findings of the trial court are not sustained by the evidence.

Order affirmed.

ELIZABETH BODDY v. NORTHWESTERN REALTY COMPANY.1

January 25, 1918.

No. 20,695.

Work and labor - question for jury.

A janitor's wife, while her husband was unable to perform his duties because of a broken leg, did his work for 3 or 4 months with the aid of a boy. The janitor was paid his usual wages for the full time. Subsequently the wife brought this action to recover the reasonable value of her services. Held: The court did not err in leaving it to the jury to determine whether plaintiff did the work with the intention of fulfilling her husband's contract or under circumstances which justified an expectation on her part of compensation from defendant. [Reporter.]

Action in the municipal court of Minneapolis to recover \$145 for work and labor. The answer was a general denial. The case was tried before Montgomery, J., who at the close of the testimony denied defendant's motion for a directed verdict, and a jury which returned a verdict for defendant. From an order denying her motion for judgment notwithstanding the verdict or for a new trial, plaintiff appealed. Affirmed.

A. C. Middelstadt, for appellant.

Koon, Whelan & Hempstead, for respondent.

PER CURIAM.

For several years James M. Boddy was the janitor of an apartment building belonging to defendants and resided in one of the flats of the building with plaintiff, his wife. In March, 1916, he broke his leg and was unable

¹Reported in 166 N. W. 124.

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to perform his duties for 3 or 4 months, and during this period his wife, the plaintiff, did his work with the assistance of a boy. Neither Boddy nor plaintiff notlified defendant of the accident or that she was doing the janitor work. A week or two after the accident, defendant's agent learned of it and also learned that plaintiff was doing the work, but nothing was ever said by either plaintiff or the agent concerning her employment or compensation or for whom she was acting. During the entire time that she performed these services defendant paid Boddy his regular salary as janitor each month. After Boddy had recovered, he engaged as janitor of another apartment building belonging to other parties and he and plaintiff removed to that building. Thereafter plaintiff brought this action to recover the reasonable value of her services during the period that her husband was incapacitated. The court left it for the jury to determine whether she performed her services with the intention of taking the place of her husband and performing his contract of hiring for him, or whether she performed them under circumstances which justified an expectation of compensation from defendant. The jury returned a verdict for defendant. We find no error in the rulings or in the charge, and the evidence amply supports the verdict.

Order affirmed.

THOMAS SKLUZACEK v. JOHN L. FOSSUM.1

January 25, 1918.

No. 20,719.

Promissory note — consideration.

Defendant became a member of a co-operative company, subscribed for one share of stock and gave his note in payment for his share. Dividends on the stock were applied on the note. The trustee in bankruptcy of the company sold the note for value to plaintiff, who sued on it. Defendant set up he had never received the certificate of stock nor any consideration for the note. Held: There was a valid consideration for the note. [Reporter.]

Action in the district court for Rice county to recover \$94.42 upon a promissory note. The case was tried before Childress, J., who at the close of the testimony denied motions for directed verdicts, and a jury which

¹Reported in 166 N. W. 124.

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returned a verdict for defendant. Plaintiff's motion for judgment notwithstanding the verdict was granted. From the order granting the motion, defendant appealed. Affirmed.

Jay W. Crane, for appellant.

James E. Trask, for respondent.

PER CURIAM.

Action upon a promissory note. Upon motion the trial court set aside the verdict and ordered judgment for the plaintiff. From an order denying his motion for judgment or a new trial defendant appealed.

In August, 1907, the Le Sueur County Co-operative Company was being organized. On the eighth day of that month the defendant, in company with a large number of other persons, subscribed for and agreed to take one share of stock each, of the face value of \$100, in the proposed corporation. The organization of the company was completed during that month.

Defendant testified that he paid his membership fee of \$5; that he supposed he was a member of the company; that he gave the note in question in payment for the share of stock for which he had subscribed; that he had never paid the same; that no certificate of stock had ever been issued to him therefor, and that the dividends were applied on his note.

After completing its organization, the company bought and took over a stock of merchandise from one J. M. Drozda, at Lonsdale. Drozda became its manager and conducted the business until June, 1911, when a trustee in bankruptcy took possession of its affairs, closed out the business and applied the proceeds thereof in payment of its debts. In closing up the affairs of the company the trustee sold the note in question to the plaintiff for a valuable consideration. In his answer the defendant admitted the giving of the note, but alleged that he had received no consideration therefor, that no certificate of stock was ever issued to him, and that the company is insolvent. There is no controversy about the facts. There was a valid consideration for the note. The issuance of a certificate of stock was unnecessary, the corporation had accepted and acted upon the defendant's subscription, and had paid dividends on the stock. Marson v. Deither, 49 Minn. 423, 52 N. W. 38.

Affirmed.

STATE v. D. R. JOHNSON.1

January 25, 1918.

No. 20,864.

Criminal law — demurrer to indictment — certificate to supreme court.

When a demurrer to an indictment is sustained the prosecution is at an end, unless submitted to another grand jury, and the trial court cannot thereafter certify to the supreme court the question involved by the demurrer. [Reporter.]

Defendant was indicted by the grand jury of Hennepin county for the crime of teaching and advocating, by printed matter, that citizens of the United States should not aid in carrying on the war. He demurred to the indictment on the ground that it did not state facts sufficient to constitute a defense and did not charge any crime. The demurrer was sustained, Molyneaux, J., and, defendant consenting, the court certified the case to the supreme court so far as necessary to present the question of law arising on the demurrer. Dismissed and cause remanded.

Lyndon A. Smith, Attorney General, and John M. Rees, County Attorney, for plaintiff.

A. B. Darelius, for defendant.

PER CURIAM.

The question whether an indictment states a public offense cannot be certified to the supreme court under G. S. 1913, § 9251, after the trial court has sustained a demurrer thereto. The order sustaining the demurrer ends the prosecution, unless the matter is ordered resubmitted to another grand jury.

The certification of this cause is therefore dismissed and the cause remanded.

¹Reported in 166 N. W. 123.

IN RE ESTATE OF JANE HETHERINGTON. WILLIAM P. HETHERINGTON AND OTHERS v. ANN BUSH AND OTHERS.1

February 8, 1918.

No. 20,703.

Will - undue influence - findings sustained.

On a second appeal, the evidence sustained findings that testatrix had mental capacity to make her will and was not unduly influenced. [Reporter.]

After the former appeal reported in 132 Minn. 379, 157 N. W. 505, the case was tried before Nethaway, J., who made findings and ordered judgment affirming the order of the probate court admitting the will and codicil to probate. From an order denying their motion for a new trial, plaintiffs appealed. Affirmed.

Morphy, Bradford & Cummins, for appellants. Kueffner & Marks, for respondents.

PER CURIAM.

This cause was before the court on a former appeal, and is reported in 132 Minn. 379, 157 N. W. 505. We there held the evidence insufficient to justify a finding of mental incapacity or undue influence, and findings to that effect were vacated and a new trial ordered. On the new trial the court found that testatrix was of sound mind and was not unduly or otherwise wrongfully influenced in making the will in question. The present appeal challenges those findings. The evidence presented by this record is for all substantial purposes the same as that presented on the former trial. It is not of a character to sustain the contention of appellant that testatrix was induced to make the will by the undue influence of her son William. It was not contended on the second trial that she was of unsound mind. A discussion of the evidence would serve no useful purpose.

Order affirmed.

¹Reported in 166 N. W. 1084.

FIRST NATIONAL BANK OF NORTHFIELD v. GALEN H. COON AND ANOTHER.¹

February 8, 1918.

No. 20.732.

Case followed.

Action in the district court for Rice county to recover possession of certain real property and for \$30 per month for use and occupation thereof. From an order, Childress, J., denying their motion to set aside their default and reinstating the cause upon the trial calendar, defendants appealed. Reversed.

Charles Jaudon Berryhill, for appellants.

R. D. Barrett, for respondent.

PER CURIAM.

This case is ruled by the case of First National Bank of Northfield v. Coon, supra, page 320, 166 N. W. 400. For the reasons stated in that opinion, the order appealed from in this case is reversed. No statutory costs.

FIRST NATIONAL BANK OF NORTHFIELD v. GALEN H. COON.¹

February 8, 1918.

No. 20,733.

Case followed.

Action in the district court for Rice county to recover \$479.81 upon four promissory notes. From an order Childress, J., denying his motion to set aside his default and reinstating the cause upon the trial calendar, defendant appealed. Reversed.

Charles Jaudon Berryhill, for appellant.

R. D. Barrett, for respondent.

PER CURIAM.

This case is ruled by the case of First National Bank of Northfield v. Coon, page 320, 166 N. W. 400. For the reasons stated in that opinion, the order appealed from in this case is reversed. No statutory costs.

1Reported in 166 N. W. 401.

JAMES B. BRADSHAW AND OTHERS v. JOHANNA HOFF.1

February 15, 1918.

No. 20,709.

Guaranty - question of execution for the jury.

Action on guaranty. Defendant testified she did not sign it. Evidence of expert in handwriting that it and two admittedly genuine signatures were in the same handwriting. Judgment of dismissal. On appeal from the judgment, held that the evidence made the question of execution one for the jury. [Reporter.]

Action in the district court for St. Louis county to recover \$1,840.23 upon a written guaranty. The answer was a general denial. The case was tried before Ensign, J., who at the close of the testimony granted defendant's motion to dismiss the action. Plaintiffs' motion for a new trial was denied. From the judgment of dismissal, plaintiffs appealed. Reversed.

Courtney & Courtney, for appellants.

John Heitmann, for respondent.

PER CURIAM.

In this action upon a written guaranty, defendant testified that she did not sign the instrument and never knew of its existence. Her daughter, whose debt purported to be guaranteed, testified that the signature was not her mother's, and that she had never requested any one to sign the guaranty. Two specimens of defendant's admittedly genuine signatures were received in evidence, and an expert in handwriting testified that in his opinion the three signatures were made by one and the same person. The trial court on defendant's motion dismissed the case, deeming the evidence insufficient to sustain a verdict, were one rendered for plaintiff. The appeal is from the judgment of dismissal. A majority of the court think the evidence such that the jury should have been permitted to determine whether or not defendant executed the guaranty.

Judgment reversed.

1Reported in 166 N. W. 329.

IN RE APPLICATION FOR REMOVAL OF ABRAHAM J. HERTZ.¹

February 21, 1918.

No. 20,192.

Attorney and client - proceeding to disbar - evidence necessary.

- 1. Charges of misconduct against an attorney must be supported by a clear preponderance of the evidence to support disbarment. [Reporter.] Same practice disapproved.
- 2. The supreme court disapproves the practice of one attorney, who in fact is prosecuting a case, obtaining another attorney, who has nothing to do with the case, to sign the papers as attorney of record to enable the former not to appear upon the records as attorney therein. Where no one has been misled, overreached or prejudiced on account of it, the practice is not sufficient ground for the disbarment of the former attorney. [Reporter.]

Same - dismissed for lack of evidence.

3. Proceeding to disbar the respondent for wilful misconduct as an attorney. One charge was that as attorney for a fraternal society he entered into a secret agreement with one of its officers to pay the latter a part of his fees and swelled his bills sufficiently to enable him to do so without loss. Another charge was that he acted for both parties to a suit. Another that he brought a suit without the knowledge or consent of the plaintiff, alleged that the insured had died when in fact he was still living, and settled the suit for \$500, which he appropriated to his own use. Another charge was that he collected moneys and failed to account for them to his clients. Held: The charges were not sustained by sufficient reliable proof and the proceeding was dismissed. [Reporter.]

The State Board of Law Examiners, through its secretary, petitioned for the disbarment of respondent for wilful misconduct in his office. Dismissed.

Eli Southworth and Charles J. Traxler, for petitioner.

C. D. O'Brien, T. R. Kane, and Keller & Loomis, for respondent.

PER CURIAM.

This is a proceeding brought by the State Board of Law Examiners to 1Reported in 166 N. W. 397.

remove the respondent, A. J. Hertz, from his office of an attorney at law for wilful misconduct as such attorney. The accusation contains five specifications of alleged misconduct:

1. From 1905 until 1916, Fred H. Silsbee was the president and general attorney of the Yeomen of America, a fraternal beneficiary society organized under the laws of the state of Illinois, and acted as executive officer or manager thereof. From time to time he employed respondent to defend actions brought against the society in the state of Minnesota. Respondent's bills for services in these cases were presented to and approved by Silsbee, and after being so approved were paid by the society. It is charged that while handling these cases respondent entered into a secret arrangement with Silsbee under which he paid to Silsbee a part of the fees received from the society, and swelled his bills to the society sufficiently to enable him to do so without loss to himself. If respondent did this and thereby assisted in transferring to an officer of the society for which he was acting as attorney moneys of the society to which such officer was not entitled, he violated his duty as an attorney. The disputed question is whether such an arrangement was in fact made and carried out.

The present method of determining the facts in cases where an attorney is charged with misconduct is somewhat unsatisfactory. The testimony is taken before a referee and comes here without any findings of fact by those who saw and heard the witnesses. Hearing the testimony as given upon the witness stand and observing the witnesses and parties as they testify, is a valuable aid in determining where the truth lies; but this court neither sees nor hears the witnesses, and must reach its conclusions from the cold record without the light which may have been thrown upon it during the taking of the testimony.

The direct evidence upon the question in dispute is fiatly contradictory. Silsbee testifies that he made such an arrangement with Hertz and received payments under it. Hertz testifies that he made no such arrangement and no such payments; but states that, as he was a young practitioner, he intended, at his own expense, to procure an experienced attorney to assist him in the trial of the cases and so informed Silsbee; that Silsbee suggested that such an expense was unnecessary as he, Silsbee, was paid for his time by the society and would come and help try the cases without cost to Hertz, except for the actual expense incurred in making the necessary trips to St. Paul; that such an arrangement was made and Silsbee came and took part in trying or settling the cases; that on such occasions he, Hertz, paid Silsbee's railroad fare and hotel bills but paid nothing more, and that no charge on account of these payments was ever made to the society either in the form of padded bills or otherwise. Silsbee in effect denies the arrangement

asserted by Hertz. There is no other direct testimony upon the question in dispute.

Hertz was merely employed to defend those specific cases which Silsbee turned over to him, and it seems to have been understood that he was at liberty to take other cases against the society. The last business which he transacted for the society seems to have been in 1913. The Yeomen and a number of other fraternal societies had issued policies to a large number of Russian and Rumanian Jews residing in the cities of St. Paul and Minneapolis. Subsequently the societies claimed that many of these policies had been obtained by aged people by misrepresenting their ages, and took steps to cancel such policies and to defend against actions brought upon them. as appears from numerous cases which have reached this court. After his employment by the Yeomen had terminated. Hertz took and prosecuted numerous cases against that and the other societies to enforce payment of the policies above mentioned. In the latter part of 1915 or early part of 1916. an investigation of the management and affairs of the Yeomen was begun by the authorities of the state of Illinois, whereupon Silsbee terminated his official connection with the society by resigning. An Illinois attorney named Lee Mighell became his successor. After investigating the cases then pending, Mighell reported to the society that not one per cent of "the Jewish fraternal cases in St. Paul and Minneapolis" were free from the taint of fraud, and that he considered Hertz the leading conspirator, and recommended, as the easiest means of defeating the cases, that proceedings be taken to disbar Hertz. Acting upon this report the society made a written proposition to the other societies interested in which, after reciting what Mighell had reported, they state:

"Mr. Mighell further says that he and the other members of the firm, Mighell, Gunsul and Allen, will undertake the task of disbarring Mr. Hertz with the understanding that some one will furnish the expenses connected with the effort, and he believes that the firm should be paid a fee of \$3,000.00 providing they are successful, and Mr. Mighell states definitely that no fee whatever will be charged unless the disbarment proceedings against Mr. Hertz are successful. The case would take several months before reaching the final decision of the supreme court and the expense for the investigation, cost, etc., is estimated at \$2,000.00."

They further state: "Our board has decided to make the following proposition to other interested societies: Namely, we advance the cost connected with the disbarment of A. J. Hertz, and if the proceeding fails we will pay these costs ourselves, but should the proceedings be successful then each of the fraternal societies interested is to pay the sum of \$250.00. Now, there are twenty societies, more or less interested, and it will take the co-operation of each one to make the estimated amount which will be necessary to carry

out this project. Please take this matter up at once and let us know at the earliest possible moment as to whether you wish to participate in this project with the understanding that if it is unsuccessful you are to be under no obligation, but should the proceeding against Mr. Hertz prove successful you are to pay the sum of \$250.00."

Mighell's position and interest are shown by the foregoing statements. The present proceedings are based upon charges which he made to the board of law examiners, and Silsbee appeared as a witness in support of such charges at his instance. We have mentioned these matters as they have some bearing when weighing the evidence. Silsbee testifies to the corrupt agreement; Hertz testifies as positively to the contrary, and gives his various transactions with Silsbee in much detail. The few facts, outside their own statements, which bear upon the question, seem to corroborate Hertz fully as strongly as they corroborate Silsbee; and, after considering all the facts and circumstances, the court is unable to say that this charge is supported by a preponderance of the evidence.

- 2. The second charge is to the effect that Hertz acted for both parties in the case of Zekman against the Yeomen. This charge is wholly without support in the record. Zekman, a friend of Hertz, sought to employ him to collect a policy issued by the Yeomen, and was informed that Hertz could not take the case on account of his business relations with the society. Hertz then introduced Zekman to other attorneys of good repute who brought suit upon the policy. There is no evidence that Hertz had anything to do with the prosecution of the suit on behalf of the plaintiff; and, while he took part in preparing the defense, it was managed by Silsbee, who alone signed the answer, and who in person made a settlement of the case with plaintiff's attorneys at a conference at which Hertz was not present.
- 3. The third charge is that Hertz brought several suits against the Yeomen, in 1915, in which he procured another attorney named Kelly, who in fact had nothing to do with the cases, to sign the papers as attorney for the plaintiffs; and that Hertz prosecuted these cases himself and merely used the name of Kelly to enable him to do so without appearing upon the records as an attorney therein. It is also made a part of this charge that Hertz, in bringing these suits, took advantage of information which he had obtained while acting as attorney for the society. These suits were not brought until some two years after Hertz had ceased to be attorney for the society, and there is no evidence that he had obtained any information, while such attorney, which had any bearing upon them. Consequently there is nothing to sustain this last charge. It appears that when these suits were brought Kelly, who was in financial straits, had his desk in Hertz' office, and that Hertz occasionally turned minor matters over to him, but that they were not partners and that each conducted his own business independently of the

other. Hertz prepared the papers in several of these cases and then at his request Kelly signed them as attorney. Hertz had a stenographer, who frequently made out the papers in cases which came into the office, and if he was absent signed his name to them by his authority. After the papers in the first cases against the Yeomen had been made out and signed by Kelly, three other cases came in while Hertz was absent, and the stenographer made out the summons and complaint in these cases, using the forms used in the prior cases, and, Kelly also being absent, she signed his name to them in the belief that she had the right to do so. All these cases were handled exclusively by Hertz and he took all the fees received from them; and the claim that he originally intended to turn them over to Kelly but subsequently concluded to retain them and the proceeds from them to reimburse himself for advances made to Kelly is not very persuasive. However there seems to have been no concealment of the fact that Hertz was prosecuting the cases, and no one seems to have been misled or deceived in respect to his connection with them. In most, if not all of them, he in person, acting as attorney for the claimants, made a settlement with the society which seems to have been satisfactory to all parties concerned. Therefore the only question presented under this third charge is whether his conduct in causing Kelly to appear of record as the attorney by whom these actions were brought and prosecuted, when in fact they were brought and prosecuted by himself. merits disbarment or suspension. While this practice is disapproved. the court is of opinion that where no one has been misled, overreached or prejudiced on account of it, it is not a sufficient ground for taking from . an attorney the right to practice his profession.

4. The fourth charge is that Hertz brought a suit in the name of Sophia Gold against the fraternal society known as the Mystic Circle upon a policy issued to her father, Isaac Singer, and payable to her at his death; that Hertz brought this suit without the knowledge or consent of Sophia Gold, and alleged therein that her father had died in 1910, although in fact he is still living, and that Hertz settled this suit with the society for the sum of \$500 which he received and appropriated to his own use.

The original mix-up in this case arose from the fact that there were two Isaac Singers, one of whom resided in the city of St. Paul, in still living, and is the father of Sophia Gold, the other of whom resided in the city of Minneapolis and died in 1910 leaving surviving him his widow, Clara Singer.

One Juster, who had been an officer of the local lodge of one or more of the beforementioned societies and who apparently represented a number of policyholders in such societies, gave Hertz several claims upon which to bring suit, among which was the claim of Clara Singer as beneficiary of a policy issued to her deceased husband, Isaac Singer. Hertz, without having or seeing the policy but using data furnished by Juster and verified by the secretary of the local lodge, brought suit in the name of Clara Singer against the Mystic Circle, alleging the issuance of the policy to Isaac Singer, his death in 1910, and that Clara Singer, his widow, was the beneficiary in the policy. In its answer the society admitted issuing the policy to Isaac Singer, and also admitted that he had died in 1910 and that Clara Singer was the beneficiary under the policy, but set forth various defenses to the action. Thereafter Hertz and the attorneys for the society made a tentative settlement of the case for the sum of \$500 which was reported to the supreme officers of the society for approval. They wrote back to the effect that the settlement would probably be approved, but that their records showed that Sophia Gold, and not Clara Singer, was the beneficiary in the policy, and that this matter must be straightened up before completing the settlement. Thereupon the local attorneys for the society wrote Hertz that they were advised by the society that the beneficiary was not Clara Singer but Sophia Gold, daughter of Isaac Singer, and that it would be necessary to bring suit in the name of Sophia Gold in order that the judgment and settlement might be effective.

Thereafter Hertz brought a new suit in the name of Sophia Gold, and the society interposed an answer setting up various defenses but admitting the issuance of the policy to Isaac Singer and his death in 1910. Subsequently Hertz and the attorneys for the society stipulated for judgment in favor of Sophia Gold and against the society in the sum of \$500. Judgment was entered pursuant to this stipulation, the amount thereof was paid to Hertz, and the judgment was satisfied by him. Apparently neither the officers of the society nor Hertz became aware of the fact that there were two Isaac Singers, one of whom was still living, until some time later.

After learning that the policy in favor of Mrs. Gold had been issued to an Isaac Singer who was still living and that Mrs. Gold claimed that the suit in her name was brought without her knowledge, the society brought suit in the district court of Ramsey county against Hertz to recover treble damages under the statute, on the ground that he had brought suit in the name of Mrs. Gold, without authority, for the purpose of defrauding the society. This suit was tried in the district court and decided in favor of Hertz, the court finding as a fact that he had been authorized by Mrs. Gold to bring the former suit and had settled with her for the proceeds thereof. These findings, of course, are not binding upon this court in the present proceedings, but the record in that case is made a part of the record here, and the evidence is substantially the same in both.

The evidence is radically conflicting. Mrs. Gold testified that she never authorized the bringing of the former suit, never had any communication with Hertz in reference to bringing it, and did not know that it had been

brought until so informed by an attorney for one of the societies after the case had been settled; and she is corroborated in several respects by other evidence. On the other hand, Hertz testified that he made an express agreement with her to bring the suit, and as to the application to be made of the proceeds, and he is corroborated in material respects by other apparently disinterested testimony. Mrs. Gold also testified that she made a settlement with Hertz, on May 14, 1916, for money collected by him upon a policy issued by another society to a relative by the name of Merriamson and was paid by check, and further testified that she never made any settlement with Hertz for the money collected from the Mystic Circle and never had any conversation with him at any time concerning it. Hertz testified that on May 14, 1916, at the conference mentioned by Mrs. Gold, he made a settlement with her, not for the Merriamson case, but for the money collected from the Mystic Circle, and corroborated his testimony by producing a canceled check, dated on that day, which had been indorsed and cashed by Mrs. Gold, and which recited upon its face, "in full settlement * * * of all claims and demands to date in case against Fraternal Mystic Circle." No attempt seems to have been made, either in this proceeding or in the suit brought by the society, to lessen the force and effect of this recital as a contradiction of Mrs. Gold. The district court, in the case in that court, gave much weight to this check as establishing that her testimony was unreliable, and we find no sufficient reason for disagreeing with the conclusions reached by that court. That the Isaac Singer who died in 1910 had a policy in one or more of the societies is not disputed, but whether he had a policy in the Mystic Circle is not made clear. However this may be, it seems reasonably certain that Hertz as well as the society believed that he was the person to whom the policy in question had been issued, and did not learn otherwise at any time during the pendency of the suit.

After examining the entire record we are unable to say that the fourth charge is sustained by the evidence.

5. The fifth charge is an omnibus charge to the effect that Hertz had collected money from various societies and failed to account for it to his clients. Three cases were investigated under this charge and it is conceded that the evidence shows no misconduct in two of them. In the third the only misconduct claimed is that Hertz collected the money and retained it a considerable time without notifying his client. The client testified that when he learned that the money had been collected he went to Hertz and that Hertz immediately paid the money over to him. Instead of making any complaint, he seems to be well satisfied with the services and treatment given him, and testified that Hertz is still his attorney and is now handling two other cases for him.

This court will not overlook or condone misconduct on the part of at-

torneys, but taking from an attorney the right to earn his livelihood in the practice of his profession, after he has spent years preparing himself to do so, is of such serious consequence to him that the charges must be supported by a clear preponderance of the evidence in order to justify disbarment. 2 Enc. Ev. 138; State Board of Examiners in Law v. Dodge, 93 Minn. 160, 171, 100 N. W. 684.

The court is of opinion that the charges contained in the accusation have not been established by sufficient reliable proof and the proceeding is dismissed.

ANNA HENRIETTA HENDRICKSON v. CITY OF BENSON.1

March 28, 1918.

No. 20,749.

Municipal corporation - negligence - contributory negligence.

Evidence ample to support the verdict that defendant city was negligent in leaving an excavation in the street for a water main unguarded at night, and that plaintiff was not negligent. [Reporter.]

Action in the district court for Swift county to recover \$15,000 for injuries received in falling into an unguarded trench. The answer alleged that plaintiff was negligent. The case was tried before Qvale, J., who when plaintiff rested denied defendant's motion to dismiss the action, and a jury which returned a verdict for \$2,500. From an order denying its motion for a new trial, defendant appealed. Affirmed.

John I. Davis, for appellant.

Larrabee & Olson, for respondent.

PER CURIAM.

Plaintiff brought suit for personal injuries and recovered a verdict, and defendant appealed from an order denying a new trial.

On November 15, 1916, defendant began digging a trench along one of its streets for the purpose of laying a water main, and left the excavation unguarded during the following night. Plaintiff, while attempting to cross the street after dark that evening, fell into this excavation and sustained serious injuries. These facts are undisputed. Even conceding that plaintiff's testimony was shown to be inaccurate in certain details as to the sit-

¹Reported in 166 N. W. 1084.

uation at the place of the accident and as to the manner in which the accident happened, the evidence is ample to support the finding of negligence on the part of defendant and of the absence of contributory negligence on the part of plaintiff. The newly discovered evidence, as remarked by the trial court, is not of such a character as to warrant a new trial. No other questions are presented and the order is affirmed.

WALTER FALEY v. J. M. LEARN.1

March 28, 1918.

No. 20,766.

New trial.

Action for the price of goods sold. Verdict for defendant. The trial court granted a new trial solely on the ground of error in the charge to the jury. Held: In limiting the ground for a new trial to errors in law, the trial court in effect approved the verdict. The claim of accident or surprise was addressed to the discretion of the court, and it would not have been error to refuse a new trial on that ground. As the charge was entirely free from criticism and the evidence supported the verdict, the order appealed from was reversed. [Reporter.]

Action in the district court for Chippewa county to recover \$425.45 for goods sold and delivered. The answer was a general denial. The case was tried before Daly, J., and a jury which returned a verdict for defendant. From an order granting plaintiff's motion for a new trial, defendant appealed. Reversed.

Raymond H. Dart, for appellant.

C. D. Bensel, for respondent.

PER CURIAM.

A new trial was granted in this cause, as stated in the memorandum attached to the order, exclusively on the ground of error in the charge of the court to the jury. We discover no such error. The instructions of the court fully stated the issues in the case, and the rules of law applicable thereto, and are entirely free from criticism. And, aside from the fact that there was no exception to the charge in the respect deemed erroneous, the only error we find in the record is the conclusion of the learned trial court that the issues in the case were not properly submitted to the jury.

¹Reported in 166 N. W. 1067.

The evidence presented an issue of fact upon the principal question in the case. In limiting the grounds for a new trial to errors in law the trial court in effect approved the verdict, and the evidence is not of a character to justify interference by this court. The claim of accident and surprise was addressed to the discretion of the trial court, and the refusal of a new trial on that ground would not have been error.

A further discussion of the case would serve no useful purpose. The evidence supports the verdict, there were no errors justifying a new trial, and the order appealed from must be and is reversed.

FRANK R. HATFIELD v. FRANZ E. HOLQUIST.1

March 28, 1918.

No. 20,799.

Broker.

Action by real estate broker to recover a commission for selling defendant's farm. Plaintiff wrote defendant he would charge 5 per cent. Defendant replied by letter he thought the commission a little too high, as plaintiff would receive a commission from the other party. Plaintiff wrote in reply that he received no commission from the other party and insisted on the 5 per cent. Defendant denied that he received plaintiff's second letter. Held: The trial court was justified in finding that defendant received the second letter and the evidence therefore shows an express contract fixing the commission at 5 per cent. [Reporter.]

Action in the municipal court of Minneapolis to recover \$375, the agreed price for services rendered defendant in the sale and exchange of property. The answer denied the allegations of the complaint, alleged that the services rendered were of no greater value than \$100, and tendered judgment for that amount. The case was tried before Bardwell, J., who when plaintiff rested denied defendant's motion to dismiss the action, and at the close of the testimony denied defendant's motion for judgment for \$100 in favor of plaintiff, made findings and ordered judgment in favor of plaintiff for the amount demanded. From an order denying his motion for amended findings and conclusions or for a new trial, defendant appealed. Affirmed.

Rieke & Hamrum, for appellant. Edwin S. Slater, for respondent.

¹Reported in 166 N. W. 1068.

PER CURIAM.

The only question in this case is whether the evidence justified the trial court in finding an express contract fixing the compensation of plaintiff, a real estate broker, for services rendered in effecting a sale or exchange of defendant's farm. At the initiation of the relations between the parties plaintiff by letter informed defendant that he would charge for his services a commission of 5 per cent. Defendant by letter stated that he thought the commission a little too high, as he supposed plaintiff would receive a commission also from the other party. Plaintiff in reply to this stated that he received no commission from the other party, and insisted on the 5 per cent. Defendant defied receiving that letter, but it appears regular on its face, was in reply to the one written by defendant, and we are of opinion that the trial court was justified in finding that he was mistaken, and that he in fact received the letter. The transaction was closed some time after the letter was received. The evidence therefore shows an express contract fixing the commission at 5 per cent.

Order affirmed.

IN RE PAYMENT OF PERSONAL PROPERTY TAXES.

STATE v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA

RAILWAY COMPANY.1

April 5, 1918.

No. 20,385.

Taxation of railway property.

- 1. Stocks and bonds of terminal companies used by defendant as part of its railway system are property owned and used for railway purposes within the meaning of the gross earnings statute. [Reporter.] Same.
- 2. Bonds of a milling company were taken in payment of freight when the milling company was embarrassed financially. The finding of the trial court that they had not been held an unreasonable time or for such time as to separate them from the ordinary working capital of defendant company, is supported by the evidence. [Reporter.]

In the matter of proceedings in the district court for Ramsey county to collect delinquent personal property taxes for the year 1915, defendant railway company filed an answer, which alleged that defendant had regu1Reported in 167 N. W. 298.

larly paid a gross earnings tax to the state of Minnesota pursuant to law, that the stock and bonds of various companies held by it and taxed, were acquired and held for railway purposes, and the payment of a gross earnings tax commutes the taxes on all its property used for railway purposes. The matter was heard before Michael, J., who made findings and ordered judgment in favor of defendant. Plaintiff's motion for amended findings and conclusions or for a new trial, was denied. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Affirmed.

Lyndon A. Smith, Attorney General, Egbert S. Oakley, Assistant Attorney General, Richard D. O'Brien, County Attorney, and Patrick J. Ryan, Assistant County Attorney, for appellant.

George W. Peterson and James B. Sheean, for respondent.

PER CURIAM.

This is a proceeding against the defendant railway company to enforce personal property taxes delinquent in Ramsey county. There was judgment for the defendant and the state appeals.

The defendant is a Wisconsin corporation. It has its principal operating and traffic office in St. Paul. It owns stock and bonds of terminal companies in St, Paul, Minneapolis and Superior, and to two of them has made advances. These terminals are used by the company as a part of its railway system. The court found that the property sought to be assessed was property owned and used for railway purposes within the meaning of the gross earnings statute. This feature of the case is controlled by State v. Northern Pacific Ry. Co. supra, page 473, 167 N. W. 294, and the court's finding is sustained.

The defendant owns \$1,500 in bonds of the Pillsbury-Washburn Company. These bonds were taken in payment of freight when the company was embarrassed and not otherwise able to pay. The date when acquired is not shown. The court found that they had not been held an unreasonable length of time or for such length of time as to separate them from the ordinary working capital of the company. Its finding is sustained.

Judgment affirmed.

Bunn, J., took no part.

J. HARRY SNURE v. JOSEPH SCHLITZ BREWING COMPANY. SAME v. SAME.¹

April 5, 1918.

No. 20,777.

Order not appealable - cases followed.

Verdict for plaintiff. Defendant's motion for judgment notwithstanding verdict denied. Its motion for new trial granted, without stating for what reason granted. Defendant appealed from the order denying its motion. Under G. S. 1913, § 8001, as amended by Laws 1917, p. 40, c. 24, and cases cited in opinion, the order was not appealable and the appeal was dismissed. [Reporter.]

Two actions in the district court for Hennepin county, one by the father of Arlene Snure, a minor, to recover \$15,000 for injuries received by the minor in a collision with defendant's truck, and the other to recover for loss of property. The actions were tried together before Steele, J., and a jury which returned a verdict for \$500 in the first action and \$43.50 in the second action. From an order denying defendant's motion for judgment notwithstanding the verdicts and granting new trials, defendant appealed. Appeal dismissed.

Herbert T. Park, for appellant. Frank W. Booth, for respondent.

PER CURIAM.

Plaintiff recovered a verdict for injuries to his minor child received in a collision with an automobile. Defendant made an alternative motion for judgment notwithstanding the verdict or for a new trial. The court denied the motion for judgment but granted the motion for a new trial without making any statement as to the reason for granting it. Defendant appealed from the order on the theory that under chapter 24, p. 40, of the Laws of 1917, an appeal would lie.

In Kommerstad v. Great Northern Ry. Co. 125 Minn. 297, 146 N. W. 975, At was held that an order refusing to grant judgment notwithstanding the verdict, but granting a new trial, was not appealable, unless it appeared that the order had been based exclusively upon the ground of errors occurring at the trial, as the right to appeal from an order granting a new trial given

¹Reported in 166 N. W. 1068.

by section 4362, R. L. 1905, and section 7998, G. S. 1913, had been taken away by chapter 474, p. 699, Laws of 1913 (G. S. 1913, § 8001), except where the new trial was granted solely because of errors occurring at the former trial. In Greenberg v. National Council of K. & L. of S. 132 Minn. 84, 155 N. W. 1053, it was held that chapter 31, p. 37, Laws of 1915, which amended section 4362, R. L. 1905, in certain other particulars but retained unchanged the provision therein in respect to appeals, did not reinstate the right of appeal taken away by chapter 474, p. 699, Laws of 1913 (G. S. 1913, § 8001). Chapter 24, p. 40, Laws of 1917, upon which defendant relies as authorizing the present appeal merely amended the statute considered in the Greenberg case in a certain other particular, but left unchanged the provision in respect to appeals. Under the cases cited, the order here in question is not appealable, and the appeal is dismissed.

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ABANDONMENT. See Vendor and Purchaser, 4.

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Where a plaintiff, pendente lite, assigns the proceeds of the litigation but not the cause of action, he still retains a sufficient interesttherein to entitle him to continue the action as plaintiff.

-McKay v. Minnesota Commercial Men's Assn. 192.

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ACTION UPON BOND OF PUBLIC CONTRACTOR.

See VENUE, 1.

BEGUN WHEN SUMMONS IS DELIVERED TO PROPER OFFICER FOR SERVICE.

- An action is deemed as begun for all purposes when the summons is delivered to the proper officer for service if such service be completed within the time prescribed by law.
 - -McCormick v. Robinson, 483.
- 2. Where an action is brought against a person in one capacity, an amendment by which it is continued against him in a different capacity does not bring in a new party nor begin a new action, but merely changes the capacity in which he is sought to be held, and the beginning of the action will date from the time it was originally begun regardless of the time when the amendment was made.
 - -McCormick v. Robinson, 483.

ADVERSE CLAIM. See EVIDENCE, 14.

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See TAXATION, 27.

Action by the purchasers to determine adverse claims of defendants, who claimed liens upon the land conveyed to plaintiffs under a recorded contract for support between their parents and their brother Albert, which charged the land with liens for the payment of specified sums of money to them. Held: The rescission of the contract between the parents and their son Albert and the reconveyance of the land to the parents discharged the liens.

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ADVERSE POSSESSION.

Possession of Platted Street by Abutting Owner not Hostile.

In order to prove title by adverse possession it is necessary to prove, not only possession, but hostile possession. When a street is dedicated by plat, the city may choose its own time to occupy, open and use the street, and until it does so, possession of the street by the abutting owner who owns the fee of the street, is not regarded as hostile and the statute of limitations will not commence to run.

-Pierro v. City of Minneapolis, 394.

ADVERTISEMENT.

CONTRACT FOR SPACE IN THEATRE PROGRAM.

See CONTRACT, 4.

AFFIDAVIT. See Court. 2.

DEFECTIVE AFFIDAVIT OF PUBLISHER OF NEWSPAPER.

See Taxation, 24.

AMENDMENT. See Action, 2; APPEAL AND ERROR, 16.

APPEAL AND ERROR.

APPEAL FROM LOCAL MUNICIPAL BOARD IN PUBLIC IMPROVEMENT MATTER.

See HIGHWAY, 1-4.

No Appeal From Order of County Board Granting Refund under Laws 1917, c. 418, for Taxes.

See TAXATION, 19.

WHEN APPEAL CANNOT BE TAKEN.

- Verdict for plaintiff. Defendant's motion for judgment notwithstanding verdict denied. Its motion for new trial granted, without stating for what reason granted. Defendant appealed from the order denying its motion. Under G. S. 1913, § 8001, as amended by Laws 1917, p. 40, c. 24, and cases cited in opinion, the order was not appealable and the appeal was dismissed.
 - -Snure v. Joseph Schlitz Brewing Co. 516.

REVIEW.

OF GROUND OF DECISION IN TRIAL COURT.

See CARRIER, 12.

EXCLUSION OF EVIDENCE REVIEWABLE ONLY WHEN OFFER WAS MADE IN TRIAL COURT TO PROVE IT WAS MATERIAL.

See WITNESS, 1.

- Certain testimony was received at the trial "subject to objection." No final ruling on the objection was made or requested. Accordingly the question of admissibility of the evidence is not presented by this appeal.
 - -State ex rel. v. District Court of Hennepin County, 32.

MOTION FOR NEW TRIAL.

- 3. Upon appeal from an order denying a new trial, a party cannot take advantage of any errors occurring on the trial and not excepted to, as required by G. S. 1913, § 7830, unless he specifies them in his notice of motion.
 - -Kelly v. McKeown, 285.

DISMISSAL OF APPEAL

See APPEAL AND ERROR, 1.

- SAME BECAUSE OF FAILURE TO SERVE NECESSARY PARTIES WITH NOTICE OF APPEAL.
 - 4. The notice of appeal in this case was served upon plaintiff and the receiver of the defendant corporation, but not upon minority stock-holders thereof who were parties defendant. The interests of these defendants in relation to the subject of the appeal are in direct conflict with a reversal or modification of the judgment appealed from. The judgment appealed from is indivisible, and must be affirmed, re-

versed, or modified as to all the parties to the action. The appeal must therefore be dismissed.

- -Thwing v. McDonald, 157.
- The trial court was not without jurisdiction, by reason of the former decision in this case, to make the orders described in the opinion.
 - -Thwing v. McDonald, 158.
- 6. An order after judgment, made on application of receivers, fixing the time for hearing on the claims against the corporation, is not one in which defendant stockholders not served with notice of appeal are affected adversely. Hence the motion to dismiss the appeal as to this order was denied.
 - -Thwing v. McDonald, 160.
- 7. An order after judgment authorizing the receivers to join with the minority stockholders of the corporation not served with notice of appeal in making and tendering to defendant McDonald an assignment of all their claims, and all the claims of the corporation, in and to a certain sum of money theretofore delivered by another corporation to a national bank, as depositary, pursuant to order of the district court, and that the delivery or tender of such assignment should be equivalent to a payment of that amount to apply on dividends thereafter accruing from said receivers to said McDonald, and directing the receivers to begin action to quiet title of the corporation to its property as against McDonald and others, is an order in which defendant stockholders are affected adversely. Hence the motion to dismiss the appeal as to this order was granted.
 - -Thwing v. McDonald, 160, 161.
- 8. An order after judgment directing the receivers to execute and deliver to a rallway company a certain instrument of license affecting the corporation's interest in certain land described, is not an order affecting adversely the minority stockholders of the corporation not served with notice of appeal. Hence the motion to dismiss the appeal as to this order was denied.
 - -Thwing v. McDonald, 161.
- 9. An order after judgment directing the receivers to pay to plaintiff's attorney from the funds of the corporation the amount of plaintiff's disbursements on the former appeal, and the amount of the judgment for costs taxed against him upon that appeal, is not one adversely affecting the minority stockholders not served with notice



of appeal, on the theory that plaintiff's suit was in the interest of the corporation. Hence the motion to dismiss the appeal as to this order was denied.

-Thwing v. McDonald, 160, 161.

MOTION TO STRIKE OUT SETTLED CASE.

- 10. Under G. S. 1913, § 7832, the court has power to extend the time limited for proposing and settling a case and to grant leave to propose a case after the time limited has expired. That attorneys attempted to serve the proposed case after the time limited had expired and before they obtained leave to do so, is not controlling. Motion to strike the settled case from the record denied.
 - -Stevens v. Fritzen, 491.

PROCEEDINGS AT FIRST TRIAL NOT REVIEWABLE AFTER SECOND TRIAL.

- 11. Granting a new trial leaves the case as if no trial had ever been had; and upon an appeal from a judgment rendered as the result of the second trial, none of the proceedings at the first trial are before this court for review.
 - -Holm v. Great Northern Railway Co. 258.

HARMLESS ERROR.

- The record presents no reversible error in the admission of evidence.
 Fairchild v. Hoyland, 187.
- 13. A party cannot complain of the reception a second time of evidence which he has once admitted without objection.
 - -Haeissig v. Decker, 422.
- Defendant is not in position to assign error upon the submission of an issue withdrawn from the jury.
 - -Nelson v. Berkner, 302.
- 15. Considering the nature of the case and the character of the evidence upon which the parties necessarily relied, it is *held* that the exclusion of proof as to the listing of plaintiffs' claim against defendant for taxation was prejudicial.
 - -Thaden v. Bagan, 47.
- 16. No error occurred in excluding evidence on matters not in issue, nor in refusing amendments to the answer during the trial which might raise new issues. Other errors assigned were without prejudice.
 - -Abernethy v. Halk, 253.

NOMINAL DAMAGES.

17. On appeal from a judgment an appellant cannot complain of nominal damages found against him which are not included in the judgment.
—Stoering v. Swanson, 115.

RES JUDICATA.

See DEED, 1.

FORMER DECISION LAW OF THE CASE.

See DEED, 2; GUARANTY, 2.

FINDINGS ON CONFLICTING EVIDENCE.

18. Breach of contract was not pleaded. There was some evidence that it was broken and some that it was not. The burden of proof was on claimant. The court made no finding on this subject and was not asked to do so. It is not the province of this court to make findings on conflicting evidence, nor on such evidence to direct the trial court what findings to make. The issue of breach of contract is not in the case as presented on this appeal.

-In re Dissolution of Blue Earth County Co-operative Co. 231.

REVERSAL.

See New Trial: Sale, 7.

- 19. The supreme court will not reverse a judgment of the trial court, although it is technically wrong, if no substantial benefit is to be accomplished by a reversal. The case is akin to a case where only nominal damages are at stake and no important principle is involved.
 - -State ex rel. v. Truax, 315.
- 20. There was no error in the rulings of the court as to the admissibility of evidence sufficient to justify a reversal.
 - -Lewistown Iron Works v. Vulcan Process Co. 181.

REMAND OF CASE FOR NEW TRIAL.

See Costs. 2.

21. Action in replevin. Defendant alleged it was entitled to reasonable time to investigate who was entitled to the shipment, and that the other claimant removed the horses before it could ascertain. The defenses were erroneously excluded at the trial. As the record shows

conclusively that defendant did not waive them, there must be a new trial.

-Taylor v. Duluth, South Shore & Atlantic Railway Co. 216.

REMAND FOR JUDGMENT.

- 22. The record in this case does not justify the conclusion that a better case can be established on another trial, and the cause is remanded for judgment on the merits in favor of defendants.
 - -Schmidt v. Capital Candy Co. 378.

PAYMENT OF COSTS ON APPEAL TO UNITED STATES SUPREME COURT.

See Costs. 1.

SAME - STAY OF PROCEEDINGS.

- 23. The case of Peery v. Illinois Central Railroad Co. was tried in the district court, and a judgment for plaintiff rendered. This judgment was affirmed by this court, but on a writ of error to the United States Supreme Court, the judgment of this court was reversed, and a judgment for costs rendered against plaintiff. Pursuant to this reversal, this court reversed its former judgment and the judgment of the trial court, and remanded the case for a new trial. It is held that the trial court had the power to stay proceedings until the judgment for costs in the United States Supreme Court was paid.
 - -State ex rel. v. District Court of Ramsey County, 464.

MAKING OF FINDINGS ON CONFLICTING EVIDENCE.

See APPEAL AND ERROR, 18.

APPROPRIATION.

WHEN AVAILABLE.

See Words and Phrases, 1.

AID TO PUBLIC SCHOOLS IN 1917 ACT.

See School and School District, 2.

ARBITRATION.

TO FIX PRICE OF GAS.

See Gas, 1, 2; Injunction, 2.

ARMY AND NAVY.

STATE ACT OF 1917 NOT ABROGATED BY ESPIONAGE LAW.

1. Chapter 463, p. 764, Laws 1917, making it a criminal offense to advocate that men should not enlist in the military forces or aid in pros-

ARMY AND NAVY-Continued.

ecuting the war, does not infringe the constitutional provision conferring upon Congress the power to raise armies, nor the constitutional provision preserving freedom of speech and of the press, and is not abrogated or superseded by Act of Congress, June 15, 1917, 40 Stat. 217, c. 30, known as the Espionage Law.

-State v. Holm, 267.

VIOLATION OF ACT OF 1917.

- Circulating a pamphlet which impugns the motives of the President and Congress in entering into the war, and seeks by unfounded assertions to incite antagonism to the war, the natural tendency of which is to deter enlistments, is a violation of chapter 463.
 - -State v. Holm, 267.
- 3. It is not necessary that the pamphlet should directly and expressly urge men to refrain from enlisting, but the statute is violated, if the natural and reasonable effect of the pamphlet is to deter men from doing so.

-State v. Holm, 272.

ASSIGNMENT. See ABATEMENT AND REVIVAL

By Receivers and Minority Stockholders of Corporation's Claims to Money on Deposit.

See APPEAL AND ERBOR, 7.

ACTION FOR DAMAGES FROM FRAUD OR DECEIT ASSIGNABLE.

- A cause of action for damages sustained by fraud or deceit is one for injury to property, not for injury to the person, survives the death of either party, and is assignable.
 - -Guggisberg v. Boettger, 226.

ATTORNEY AND CLIENT. See Corporation, 4.

DISBARMENT.

- 1. Charges of misconduct against an attorney must be supported by a clear preponderance of the evidence to support disbarment.
 - -In re Application for Removal of A. J. Hertz, 504.
- 2. The supreme court disapproves the practice of one attorney, who in fact is prosecuting a case, obtaining another attorney, who has nothing to do with the case, to sign the papers as attorney of record to enable the former not to appear upon the records as attorney therein.

ATTORNEY AND CLIENT-Continued.

Where no one has been misled, overreached or prejudiced on account of it, the practice is not sufficient ground for the disbarment of the former attorney.

- -In re Application for Removal of A. J. Hertz, 504.
- 3. Proceeding to disbar the respondent for wilful misconduct as an attorney. One charge was that as attorney for a fraternal society he entered into a secret agreement with one of its officers to pay the latter a part of his fees and swelled his bills sufficiently to enable him to do so without loss. Another charge was that he acted for both parties to a suit. Another that he brought a suit without the knowledge or consent of the plaintiff, alleged that the insured had died when in fact he was still living, and settled the suit for \$500, which he appropriated to his own use. Another charge was that he collected moneys and failed to account for them to his clients. Held: The charges were not sustained by sufficient reliable proof and the proceeding was dismissed.

-In re Application for Removal of A. J. Hertz, 504.

LIEN OF ATTORNEY.

IN PROCEEDING UNDER WORKMEN'S COMPENSATION ACT.

See Workmen's Compensation Act, 11.

NO ATTORNEY FEES ALLOWED RECEIVER IN SUPPLEMENTARY PROCEEDING.

See EXECUTION.

AUTOMOBILE.

REGISTRATION PRIMA FACIE EVIDENCE OF OWNERSHIP.

See HIGHWAY, 6.

CONVICTION FOR LARCENY OF MACHINE BY BAILER.

See CRIMINAL LAW, 12.

SERVANT KILLED BY ACCIDENT IN THE COURSE OF HIS EMPLOYMENT IN NORTH DAKOTA WITHIN THE TERMS OF THE WORKMEN'S COMPENSATION ACT.

See Workmen's Compensation Act, 7.

NEGLIGENCE IN OPERATION.

See HIGHWAY, 6, 7.

BAILMENT. See CARRIER, 8.

BANK AND BANKING. See PRINCIPAL AND AGENT, 2.

· CONSPIRACY TO KITE CHECKS.

See CONSPIRACY.

- 1. Defendants Gesell and Curtis lived at Thief River Falls. Gesell ran a cigar factory and a furniture store there, and a cigar factory at Warren. Curtis ran a drug store there, dealt in lands, wrote insurance, and was a director in the First National Bank at Thief River Gesell kept a deposit account at a state bank in Warren and the national bank at Thief River Falls. In the spring of 1915 he opened an account in the Farmers State Bank at Holt in the name of his furniture company. Each day in July and up to August 14, 1915, he made daily deposits of several hundred dollars in the national bank. In his deposits to his individual account there was each time a check drawn by his furniture company upon the state bank at Holt in favor of J. T. Curtis, the first one shown in the record being for \$640 on July 31. Every banking day thereafter a similar check in every respect was deposited, except that the amount each day was \$10 less than that of the previous day. These checks were indorsed by the payee, sometimes in blank, more often with the stamp "Pay any Bank or Banker, or order. J. P. Curtis." The national bank indorsed and sent these checks to a bank in Crookston where they were paid by the state bank at Holt through a bank at Red Lake Falls. Curtis understood that the national bank would not place the checks of the furniture company to the credit of Gesell unless they were indorsed by a responsible party, and for that reason Gesell procured Curtis as payee and indorser. The evidence made it clear that the way in which Gesell was using these checks to procure credit was not the usual way of dealing and was calculated to defraud the banks. The president of the state bank at Holt repaid his bank for the money obtained by Gesell on worthless checks and brought this action against Curtis and Gesell for conspiracy to defraud the bank by means of a check kiting scheme. Verdict in favor of plaintiff. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, defendant Curtis appealed. Held:
 - (1) Whether Curtis knew that the checks which he permitted Gesell to issue to him as payee and he indorsed and delivered to Gesell, were used by the latter in a check kiting scheme to defraud the bank upon which they were drawn, was a question for the jury under the evidence.



BANK AND BANKING-Continued.

- (2) No reversible error is found in the trial court's rulings or instructions.
 - -Backe v. Curtis, 64.
- The issue was rightly left to the jury whether, when honoring the checks, the officers of the bank knew, or in the exercise of ordinary prudence should have known, the manner in which Gesell was doing his banking business.
 - -Backe v. Curtis, 64.

CERTIFICATE OF DEPOSIT - TO WHOM PAYABLE.

- 3. Action to recover the amount of certificates of deposit issued by defendant to German Lutheran Cemetery payable to its treasurer and its president, and paid by defendant to the treasurer alone, the certificates having been aitered by him so that as presented they were payable to the treasurer or the president. It is held:
 - (1) Conceding that defendant could have rightfully paid the certificates without an indorsement, it was bound to pay to the person or persons authorized by the terms of the certificates to receive payment. Payment to the treasurer was not justified unless he was by the terms of the certificates so entitled to receive payment, and it is not material that he was in fact the treasurer of the cemetery and as such in charge of its funds, or that defendant so believed. It was not error to receive in evidence a certain resolution, or the testimony of the president as to instructions given defendant's teller as to whom the certificates should be made payable.
 - (2) The certificates belonged to plaintiffs, under the name of German Lutheran Cemetery. The treasurer and president were their agents to receive payment, and plaintiffs, for their own protection, had provided against payment to either without the consent of the other. Under these circumstances a payment to either agent alone, without the other's consent, does not discharge the bank's liability to the principal.
 - (3) The evidence justified a finding that the treasurer never paid over to plaintiffs or accounted for the moneys received on the certificates.
 - (4) Defendant cannot complain that the trial court instructed the jury that plaintiffs could not recover unless defendant was negli-

BANK AND BANKING-Continued.

gent, though if the certificates were altered after they were issued so as to make them payable to either the treasurer or the president, the defendant is liable, even though it was not negligent. There was no prejudice to defendant in receiving evidence on this issue, or in instructing the jury thereon.

- (5) There was no error in instructions to the jury as to certain of the certificates which as presented for payment did not have the word "or" between the names of treasurer and president.
- (6) The court did not err in allowing plaintiffs interest at 6 per cent from the date of the demand upon defendant.
 - -Trustees of German Evangelical Lutheran St. John's Congregation v. Merchants National Bank, 80.

PURCHASE OF UNITED STATES BONDS BY STATE BANK NOT LIMITED BY STATUTE.

- 4. By G. S. 1913, § 6358, providing that the total liabilities of any person, corporation, or copartnership to a state bank shall never exceed 15 per cent of its capital and surplus, it was not intended to limit the amount of bonds of the United States that a state bank might purchase or hold.
 - -Trumer v. South Side State Bank. 222.

TAXATION OF STOCKHOLDERS IN NATIONAL BANK.

See TAXATION, 1-5.

- 5. When a bank pays a dividend it knows, or can readily ascertain, the amount of any tax upon the shares of its stock then entered upon the tax lists, and must make provision for the payment of such tax, but the statute (section 2021) does not require it to provide at that time for a tax neither due nor levied and the amount of which cannot then be ascertained.
 - -State v. Security National Bank, 173.

BENEFIT ASSOCIATION.

- 1. Plaintiff began work as a mason and bricklayer at the age of 12 and continued actively at work at his trade until he was over 69 years of age, when he met with an accident. Action to recover a disability pension. Verdict in favor of plaintiff. Held: The verdict is supported by evidence.
 - -Fitzgibbons v. Bowen, 197.

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BENEFIT ASSOCIATION-Continued.

- 2. Complaint considered, and held to state a cause of action.
 - -Fitzgibbons v. Bowen, 197.

CONSTRUCTION OF DISABILITY PENSION PLAN.

3. Where a mutual organization, devoted to the general welfare of its members, adopts and provides for a disability pension plan in its by-laws, the rule of construction applicable to such by-law is the same as applied to a contract of insurance prepared by an insurance company, and a liberal construction will be given in favor of the rights of the member.

-Fitzgibbons v. Bowen, 197.

BILLS AND NOTES.

CONSIDERATION.

See EVIDENCE, 12.

1. Defendant became a member of a co-operative company, subscribed for one share of stock and gave his note in payment for his share. Dividends on the stock were applied on the note. The trustee in bankruptcy of the company sold the note for value to plaintiff, who sued on it. Defendant set up he had never received the certificate of stock nor any consideration for the note. Held: There was a valid consideration for the note.

-Skluzacek v. Fossum, 498.

LIABILITY OF ACCOMMODATION INDORSER.

- 2. In an action on a promissory note made by the defendant makers at the request of the plaintiff bank to the defendant payee without consideration passing from him to them, and indorsed by the defendant payee to the plaintiff at its request and without consideration, the evidence is held to show as a matter of law that the indorsement was for the accommodation of the plaintiff and it cannot recover thereon.
 - -State Bank of Willow River v. Pangerl, 19.

BLOOD POISON. See Workmen's Compensation Act, 3. BOND.

UNITED STATES BONDS AS SAFE INVESTMENT.

See EVIDENCE, 1.

PUBCHASE OF UNITED STATES BONDS BY STATE BANK NOT LIMITED BY SECTION 6358, G. S. 1913.

See BANK AND BANKING, 4.

BOND—Continued.

ISSUE OF COUNTY BONDS FOR ERECTION OF COURT HOUSE.

See County and County Officers, 2.

ISSUE OF BONDS EOR CONSTRUCTION OF SCHOOL HOUSE.

See School and School District, 1.

WHAT BONDS OWNED BY RAILWAY COMPANIES ARE WITHIN THE MEANING OF THE GROSS EARNINGS STATUTE AND WHAT ARE SUBJECT TO AN AD VALOREM TAX.

See TAXATION, 7-13.

CHANGE IN BOND OF SURETY NOT RETROACTIVE IN EFFECT.

See PRINCIPAL AND SURETY, 1.

FAILURE OF INSURED TO FURNISH SUPERSEDEAS BOND.

See INSURANCE, 6.

CONSTRUCTION.

See TIME.

BOUNTY.

PAYMENT OF STATE WOLF BOUNTY BY COUNTY.

- Under G. S. 1913, § 5197, a county cannot be compelled to pay the
 wolf bounty offered by the state and payable out of state funds in
 the absence of a state fund out of which the county can be reimbursed, though the statute contemplates that in ordinary course and
 as a matter of convenience the county shall first pay.
 - -State ex rel. v. Bertilrud, 356.

PAYMENT OF COUNTY WOLF BOUNTY.

- The additional wolf bounty offered by a county under G. S. 1913, \$
 5198, which is a primary charge upon the county, is payable irrespective of the payment of the state bounty or the condition of the state bounty fund.
 - -State ex rel. v. Bertilrud, 356.

REPEAL OF WOLF BOUNTY RESOLUTION.

- A resolution of a county board held not to repeal a previously passed resolution giving a county wolf bounty.
 - -State ex rel. v. Bertilrud, 356.

BRICKLAYERS, MASONS AND PLASTERERS INTERNATIONAL UNION. See BENEFIT ASSOCIATION, 1-3.

BROKER.

ACTION FOR COMPENSATION.

- 1. The evidence sustains a finding of the jury that the plaintiff effected a sale of land of the defendants' intestate under an agreement with him whereby he was to have for his compensation all in excess of a stated selling price.
 - -Thaden v. Bagan, 46.
- 2. Action by real estate broker to recover a commission for selling defendant's farm. Plaintiff wrote defendant he would charge 5 per cent. Defendant replied by letter he thought the commission a little too high, as plaintiff would receive a commission from the other party. Plaintiff wrote in reply that he received no commission from the other party and insisted on the 5 per cent. Defendant denied that he received plaintiff's second letter. Held: The trial court was justified in finding that defendant received the second letter and the evidence therefore shows an express contract fixing the commission at 5 per cent.
 - -Hatfield v. Holquist, 513.

PERFORMANCE OF SERVICES.

3. The evidence sustains the finding of the jury that the plaintiff's services in securing an exchange of a mill and house for farm land were performed under a contract with the defendant contemplating compensation in the event of a successful result and not as a mere voluntary or friendly service nor under an agreement for a specific sum based on the exchange value of the defendant's property.

-Grose v. Koller, 92.

BY-LAW.

CONSTRUCTION OF PENSION PLAN OF BENEFIT ASSOCIATION SAME AS IF CONTRACT PREPARED BY INSURANCE COMPANY.

See BENEFIT ASSOCIATION, 3.

CANCELATION OF INSTRUMENT.

COUNTERCLAIM.

Evidence that the heirs of the owner of land agreed to convey to defendant, their brother, that portion occupied by plaintiff to be held by

CANCELATION OF INSTRUMENT-Continued.

defendant for the use and benefit of plaintiff and his wife and children, plaintiff and his wife to have a life estate therein, and when plaintiff's financial difficulties were overcome, defendant was to convey the land to the children, subject to a life estate of their parents; that a deed of the usual form, without conditions or reservations was executed and plaintiff and his family continued as before to occupy the land. Later plaintiff repudiated the agreement and demanded a reconveyance of the land, and brought this action to cancel defendant's interest in the deed, and obtain a reconveyance. Defendant set up a claim of \$2,400 for use and occupation of the land from the date of the deed. Held: The refusal of the trial court to find that defendant was the owner in fee of the land, and the further refusal to find that he was entitled to rent for the use and occupation thereof by plaintiff, sustained by the evidence.—Harney v. Harney, 140.

CARRIER.

TRANSPORTATION OF FREIGHT.

- 1. Chapter 90, p. 76, Laws 1913, the Distance Tariff Act, was intended to prescribe a general tariff as to all shipments over one continuous line, whether owned by two or more companies, or created by joint traffic agreement as in the case at bar. Chapter 344, p. 486, Laws 1913, the Joint Rate Act, was intended to cover that class of transportation where the affected lines have no through traffic arrangements and it has no application to the situation presented in this case.
 - -State ex rel. v. Chicago, Milwaukee & St. Paul Railway Co. 63.

TRAFFIC AGREEMENT CREATES CONTINUOUS THROUGH LINE.

- Chapter 90, p. 76, Laws 1913, the Distance Tariff Act of that year, and a tariff order made thereunder by the Railroad and Warehouse Commission apply to traffic carried on under such contract.
 - -State ex rel. v. Chicago, Milwaukee & St. Paul Railway Co. 55.

TRAFFIC GOVERNED BY DISTANCE TARIFF ACT.

- 3. The judgment of the court below so declaring, and requiring a compliance with the order as respects shipping points within the state, is not an interference with interstate commerce, and violates none of the constitutional rights of appellant.
 - -State ex rel. v. Chicago, Milwaukee & St. Paul Railway Co. 55.

CARRIER—Continued.

THEOUGH TRAFFIC AGREEMENT CREATES CONTINUOUS THROUGH LINE.

- 4. The legal effect of a through traffic agreement between two or more railroad companies owning and operating connecting lines of road is the creation of a new and independent continuous line.
 - -State ex rel. v. Chicago, Milwaukee & St. Paul Railway Co. 55.
- 5. The contract between the Northern Pacific Railway Company and defendant company brings this case within the rule, and with respect to the traffic there agreed upon creates a continuous through line under the control of appellant, between the points therein stated.
 - -State ex rel. v. Chicago, Milwaukee & St. Paul Railway Co. 55.

CONSTRUCTION OF TARIFF.

- 6. Defendant has a line of railway which extends from Linton, North Dakota, through Strasburg, North Dakota, to Minneapolis, Minnesota. Its published tariff filed with the Interstate Commerce Commission names 17 cents per hundred pounds as the rate for carrying wheat from Strasburg to Minneapolis, and 16 cents per hundred pounds as the rate for carrying wheat from Linton, the next more distant station, to Minneapolis. The tariff also provides: "Between stations on the C., M. & St. P. Ry. rates to and from intermediate stations will be the same as shown to or from the next more distant station to or from which rates are named." Held, that this provision applies only to shipping points to or from which a specific rate is not named and which are intermediate between stations to or from which a specific rate is named, and does not apply to Strasburg, and that the legal rate for shipments from Strasburg is the specific rate named therefor.
 - -Reliance Elevator Co. v. Chicago, Milwaukee & St. Paul Railway Co. 69.

FREIGHT RATES IN PUBLISHED TARIFF.

- 7. The rates for interstate shipments named in a tariff published and filed as provided by the interstate commerce law are valid and binding until changed in the manner provided in that law.
 - -Reliance Elevator Co. v. Chicago, Milwaukee & St. Paul Railway Co. 69.

DELIVERY OF SHIPMENT - DISPUTED OWNERSHIP.

8. Where the adverse claimant claimed no rights under the contract of shipment, and made no claim to the property until after it had

CARRIER-Continued.

arrived at its destination, the carrier owed to him only the duties of a bailee or warehouseman, and may relieve itself from liability by showing that without fault or negligence on its part it is unable to produce or deliver the property.

- -Taylor v. Duluth, South Shore & Atlantic Railway Co. 216.
- 9. Where, upon arrival at destination, property is demanded from a carrier by the consignee and also by an adverse claimant, the carrier is entitled to a reasonable time for investigation, upon its request therefor, before an action will lie against it.
 - -Taylor v. Duluth, South Shore & Atlantic Railway Co. 216.

ACTION TO RECOVER BALANCE OF LEGAL FREIGHT CHARGE.

- 10. The consignor or shipper is primarily liable to the carrier for the freight. But if the consignee, the presumed owner, accepts an interstate shipment and pays part of the freight, the law implies an agreement on his part to pay the balance to the carrier, where, as here, the carrier, at the time of the delivery of the shipment, has no knowledge of the arrangement between the consignor and consignee as to the payment of the freight, and the consignor then is and ever since has been insolvent.
 - -Chicago, Minneapolis & St. Paul Railway Co. v. Greenberg, 428.
- 11. In an action by a railroad company to recover a balance of the legal freight upon an interstate shipment from the consignee who had accepted the shipment, paid the amount of the freight erroneously understated in the bill of lading, and settled with the consignor upon that basis, the defense of estoppel is not available, for the consignee is conclusively presumed to have had knowledge of the published legal rate.
 - -Chicago, Milwaukee & St. Paul Railway Co. v. Greenberg, 428.

ACTION TO RECOVER OVERCHARGE-DISMISSAL.

- 12. Plaintiff, without questioning the validity of the published rate, sought to recover an alleged overcharge, but as the stipulated facts show that it paid the legal rate and no more, the action was properly dismissed, although the court erroneously based the dismissal upon the ground that it had no jurisdiction.
 - —Reliance Elevator Co. v. Chicago, Milwaukee & St. Paul Railway Co. 70.

CASE.

MOTION TO STRIKE OUT SETTLED CASE.

See APPEAL AND ERROR, 10.

CASES DISTINGUISHED.

Crombie v. Little, 47 Minn. 581, 50 N. W. 823.

-McCormick v. Robinson, 487, 488.

Davis v. Swedish-Am. Nat. Bank, 78 Minn. 408, 80 N. W. 953.

-Thwing v. McDonald, 160.

Fonda v. St. Paul City Ry. Co. 72 Minn. 1, 80 N. W. 366.

-State ex rel. v. District Court of Ramsey County, 467.

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CERTIFYING CASE TO SUPREME COURT.

AFTER DEMURRER TO INDICTMENT HAS BEEN SUSTAINED.

See CRIMINAL LAW, 5.

CERTIORARI.

WHAT IS REVIEWABLE UPON WRIT TO REVIEW ORDERS MADE IN PROCEEDING UNDER WORKMEN'S COMPENSATION ACT.

See Workman's Compensation Act, 9, 10.

CITY OF BENSON. See MUNICIPAL CORPORATION, 4.

CITY OF MINNEAPOLIS. See EMINENT DOMAIN, 1-3.

CITY OF RED WING. See GAS, 1, 2; WORDS AND PHRASES, 2.

CITY OF ST. PAUL. See EXPLOSIVE.

COMMERCE.

INTERSTATE COMMERCE.

See CARRIER, 3, 10, 11.

TARIFF ON INTERSTATE SHIPMENTS.

See CARRIER, 7.

JURISDICTION OVER UNREASONABLE OR DISCRIMINATORY RATE.

Original jurisdiction to determine whether interstate rates are unreasonable, or discriminatory, or infringe the law in some other respect,

COMMERCE-Continued.

has been withdrawn from the courts and vested in the Interstate Commerce Commission.

-Reliance Elevator Co. v. Chicago, Milwaukee & St. Paul Railway Co. 70.

JURISDICTION OVER ACTION TO RECOVER OVERCHARGE.

- If the validity of the published rate is not questioned, the state court has jurisdiction of an action to recover the amount of an alleged overcharge.
 - -Reliance Elevator Co. v. Chicago, Milwaukee & St. Paul Railway Co. 70.

COMPROMISE AND SETTLEMENT. See SALE, 8.

RESCISSION WHEN PROCURED BY MISREPRESENTATION OF MATERIAL FACT.

See RELEASE.

MOTION TO VACATE STIPULATION FOR SETTLEMENT OF LITIGATION.

See STIPULATION, 2.

CONSIDERATION. See Corporation, 3; Deed, 2; Frauds (Statute of), 1;

WANT OF CONSIDERATION IN PROMISSORY NOTE. See BILLS AND NOTES, 1, 2; EVIDENCE, 12.

CONSPIRACY.

To KITE CHECKS.

Whether appellant knew that the checks, which he permitted the defendant Gesell to issue to him as payee and which he indorsed and delivered to Gesell, were used by the latter in a check-kiting scheme to defraud the bank upon which they were drawn, was a question for the jury under the evidence. No reversible error is found in the court's rulings or charge.

-Backe v. Curtis, 64.

CONSTITUTION. See CARRIER, 3; WORKMEN'S COMPENSATION ACT, 5.

POWER OF LEGISLATURE.

See Constitution, 5.

- 1. The state legislature possesses all legislative power not withheld or forbidden by the state or Federal Constitution. The provisions of the state Constitution, so far as applicable to the Minimum Wage Act, are not more restrictive than the Fourteenth Amendment to the Federal Constitution.
 - -Williams v. Evans, 32.



CONSTITUTION-Continued.

- 2. The legislature can make a presumption conclusive unless such presumption would impair some right protected by the Constitution.
 - -State ex rel. v. District Court of Hennepin County, 409.

DELEGATION OF POWER BY LEGISLATURE.

- 3. The legislature cannot delegate legislative power, but it may delegate authority or discretion to be exercised under and in pursuance of the law. It may delegate power to determine some fact or state of things upon which the law makes its own operation depend.
 - -Williams v. Evans, 32.
- The wage act was a complete statute when it left the legislature, and does not delegate legislative power to the Minimum Wage Commission.
 - -Williams v. Evans, 33.

RAISING OF MILITARY FORCE.

LAWS 1917, p. 764, c. 463, NOT INVALID.

See ARMY AND NAVY, 1.

LIBERTY OF CONTRACT NOT ABSOLUTE.

5. The Fourteenth Amendment guarantees to the citizen liberty of contract and liberty to conduct his business affairs in his own way. The liberty of contract is not absolute. It is subject to the power of the state to legislate for certain permissible purposes, such as regulation of hours of labor for women, or of minors in certain occupations, or of men engaged in employments hazardous to, health, or of men employed on public work, or conditions of labor or the time of payment of employees, or the manner or medium of payment. The power of the state legislature is coincident with what is familiarly known as the police power.

-Williams v. Evans, 38, 39.

FREEDOM OF SPEECH.

LAWS 1917, P. 764, C. 463, NOT INVALID.

See ARMY AND NAVY, 1.

- 6. Defendant had no constitutional right by means of the privilege of freedom of speech to force his thoughts upon the attention of the public in public places in such manner that riot and disorder would inevitably result.
 - -State v. Broms, 404.

CONSTITUTION—Continued.

MINIMUM WAGE ACT.

 Inequalities of minor importance do not render a law invalid. The limitations of the Constitution are flexible enough to permit of practical application.

-Williams v. Evans, 33.

CONTRACT.

LIBERTY OF CONTRACT.

See Constitution, 5.

EXPRESS CONTRACT.

See Broker, 2; Contract, 5.

RIGHT TO COMPENSATION UNDER WORKMEN'S COMPENSATION ACT BASED ON CONTRACT.

See WORKMEN'S COMPENSATION ACT, 2.

VALIDITY CONTROLLED BY LAW OF IOWA.

1. The contract was entered into in the state of Iowa, where the parties resided, and with reference to the laws thereof, and its validity as to the statute of frauds is controlled by the laws of that state.

-Matson v. Bauman, 296.

OFFER AND ACCEPTANCE.

See Broker, 2.

- 2. By letter plaintiff offered to furnish the mill work for a certain building for which defendant had the contract, "subject to a mutually satisfactory contract," for a specified sum. The proposal was accepted by defendant in writing at the foot of the letter. The next day plaintiff acknowledged receipt of signed contract given our Mr. Taylor. Plaintiff furnished part of the millwork, when it refused further to perform its contract and sued for the balance due. The answer claimed damages for the breach. Held: The trial court correctly instructed the jury that a contract was made between plaintiff and defendant, that it was admitted that the contract was broken by plaintiff, and that the only question for the jury was the extent of the damages sustained by defendant from the breach.
 - -Huttig Manufacturing Co. v. National Contracting Co. 108.
- 3. Country merchants offered in writing to "turn over" their entire stock of merchandise to a co-operative company to be incorporated, with by-laws recommended by the Right Relationship League, the value

CONTRACT-Continued.

or price to be determined by appraisement, provided 20 or more persons would each subscribe \$100 to the company. The sellers were to be credited on the books with a number of shares equal to the agreed purchase price, and as additional sales of stock were made, the proceeds of the sales were to be paid to the sellers in reduction of the credit on the books. It was provided neither the corporation nor the board of directors should incur any liability by authorizing the credit. Forty persons subscribed and incorporated and the offer was accepted by the corporation. Held: The contract was valid.

-In re Dissolution of Blue Earth County Co-operative Co. 232, 233.

4. Instruments executed at the same time, for the same purpose, and in the course of the same transaction, are, in the eye of the law, one instrument, and will be read and construed together. Rule applied where offer of advertising space in theatre program and acceptance were in the form of letters. Both letters were dictated by the manager of plaintiff and the acceptance omitted one term in the offer on which emphasis had been put.

-American Poster Co. v. Cammack, 372.

CONSIDERATION.

See Corporation, 3; Frauds (Statute of), 1.

PERFORMANCE

OF HUSBAND'S CONTRACT BY WIFE.

See WORK AND LABOR, 1.

SAME - PLEADING AND PROOF.

Since plaintiff alleged an express contract and alleged full performance, it can only recover on proof that it has performed the contract.
 —Northwestern Marble & Tile Co. v. Swenson, 365.

CONSTRUCTION.

See CORPORATION, 16: SALE, 1.

OF DISABILITY PENSION PLAN.

See BENEFIT ASSOCIATION, 3.

RESCISSION.

OF CONTRACT FOR SUPPORT OF PARENTS.

See Adverse Claim; Deed, 2.

CONTRACT—Continued.

OF LAND CONTRACT BECAUSE OF FALSE REPRESENTATION AS TO EXISTING FACTS.

See VENDOR AND PURCHASER. 2.

OF LAND CONTRACT BECAUSE OF FRAUDULENT PROMISSORY REPRESENTATIONS

MADE WITH NO INTENTION OF KEEPING THEM.

See VENDOR AND PURCHASER, 3.

SUBSTANTIAL PERFORMANCE OF BUILDING CONTRACT.

- 6. The evidence in an action by the owners against the contractor, after he had been paid, for the breach of a contract to build a house, was such as to sustain though not to require a finding that the defendant substantially performed and that such defects as there were could be readily remedied by a reasonable expenditure so that the plaintiffs would then have the house for which they contracted.
 - Snider v. Peters Home Building Co. 413, 415.
- 7. The plans did not call for a soil pipe. The ordinance required one and it is conceded there should be one. To accommodate it, it was necessary to make a jog of a few inches either in the bath room or in the bedroom. Defendant made it in the bedroom. It was largely a question of judgment where it should be. Plaintiffs knew what was being done and made no substantial objection. This was not sufficient to constitute substantial nonperformance.
 - -Snider v. Peters Home Building Co. 415.

SAME - MEASURE OF DAMAGES.

- 8. In Minnesota, the builder who has in good faith substantially performed, though there are minor defects, if they are of a character which may be so remedied that the owner will have that for which he contracted, may recover on the contract the agreed price less such sum as will cure the defects. This rule is applicable only when there has been a good-faith effort to perform and the defects may be remedied so the owner will have that for which he contracted.
 - -Snider v. Peters Home Building Co. 415.

BREACH.

See APPEAL AND ERROR, 18; CONTRACT, 2, 6; CORPORATION, 6, 10, 16.

IN CONTRACT FOR SALE OF STOCK.

See Corporation, 10.

DAMAGES NOT EXCESSIVE.

See DAMAGES, 1.

CONTRACT-Continued.

SAME - MEASURE OF DAMAGES.

9. In case of substantial performance of a building contract the measure of damages is the reasonable cost of remedying defects which could be readily remedied, and not the difference in value between the house as it was and as it should have been; and it was error to exclude from the jury the cost of remedying defects.

-Snider v. Peters Home Building Co. 413.

RECOVERY OF LOST PROFIT.

See SALE, 9, 10.

EVIDENCE.

See CONTRACT, 5.

CORPORATION.

MEANING OF WORD IN DEFENDANT'S FRANCHISE.

See Words and Phrases. 2.

SURPLUS.

1. The net profits of a corporation go to make up its surplus. It denotes what remains after defraying every expense, including loans falling due as well as interest on such loans. Profits are the surplus earnings available for the payment of dividends. The net profits, or surplus, of a corporation belong to its stockholders when it is to be distributed either under the authority of the board of directors or pursuant to the terms of a contract.

-Cochrane v. Interstate Packing Co. 458.

MAJORITY CONTROL OF STOCK IN RAILWAY CORPORATION.

See TAXATION, 13.

SUBSCRIPTION TO STOCK.

· See BILLS AND NOTES. 1.

SALE OF MERCHANDISE FOR SHARES OF CO-OPERATIVE COMPANY.

See CONTRACT, 3.

SALE OF STOCK BY ONE NATIONAL BANK TO ANOTHER.

See TAXATION, 3.

RIGHT TO REFUND OF ASSESSMENT PASSES WITH SALE OF SHARES.

See Corporation, 11.

CORPORATION-Continued.

SALE OF STOCK - CONSTRUCTIVE FRAUD.

- 2. Plaintiff's testate sold to two of defendants certain stock in a corporation in which all were actively engaged, taking in payment a note secured by the stock as collateral, payable only out of dividends on the stock. This action is brought to set aside the transfer, not on the ground of misrepresentation or deceit, but of constructive fraud. The principle of law invoked is, that he who bargains in a matter of advantage with a person placing confidence in him, cannot be permitted to get the better of the bargain. Held: The facts do not bring the case within that principle. Deceased acted understandingly and with free volition. His acts bound him.
 - -Peavey v. Wells, 174.
- The nature of the consideration, under the circumstances of the case, raises no presumption of fraud.
 - -Peavey v. Wells, 174.
- 4. Failure to secure independent legal advice is not, in itself, ground for avoiding the transaction.
 - -Peavey v. Wells, 174.
- 5. The fact that the transaction also involved the creation of a trust making defendants trustees and deceased a beneficiary, does not affect the validity of the transfer of stock.
 - -Peavey v. Wells, 174.

SAME - AGREEMENT TO BUY BACK.

- 6. Defendant sold and delivered to plaintiff five shares of the capital stock of a certain corporation, and as a part of the transaction agreed to repurchase or take the same back at a stipulated amount on a date specified, if plaintiff then wished to sell the same. It is held, following Lyons v. Snider, 136 Minn. 252, 161 N. W. 532, that a breach of the agreement by defendant vested in plaintiff the right of action for the amount stipulated to be paid on the return of the stock.
 - -Matson v. Bauman, 296.
- The contract was the personal obligation of defendant, and the claim that the stock was sold by him as the agent of the corporation is not sustained.
 - -Matson v. Bauman, 296.
- 8. July 1, 1915, was the date specified in the contract on which defendant agreed to repurchase. On May 22, 1915, the attorneys of the



CORPORATION-Continued.

plaintiff notified defendant that plaintiff wished to sell and demanded that defendant buy the stock on July 1 as agreed. About July 1, 1916, plaintiff again demanded performance and then formally tendered back the stock certificate. *Held*: A tender of the stock and demand that defendant perform his contract to repurchase the same was seasonably made, time was not of the essence of the contract, and it was not necessary that the demand for performance be made on the precise date named in the contract.

- -Matson v. Bauman, 296.
- The findings that the fraudulent representations were made, were of material facts and not mere expressions of opinion or "trade talk," are sustained by the evidence.
 - -Guggisberg v. Boettger, 228.

BREACH OF CONTRACT TO TRANSFER STOCK.

- 10. Conflicting evidence as to whether plaintiff was one of the promoters of a mining corporation and entitled to a portion of the bonus stock. Verdict in favor of plaintiff. Held: The evidence supports a finding by the jury of a valid agreement by defendant to transfer and deliver to plaintiff certain full-paid shares, and his failure and refusal to perform the same.
 - -Fairchild v. Hovland, 187.

ASSESSMENT UPON STOCKHOLDERS-REFUND OUT OF SUBSEQUENT PROFITS.

- 11. The stockholders of defendant, a corporation, at its request, by five written agreements, voluntarily assessed the shares of stock held by them, and paid such assessments into its treasury to restore defendant's impaired capital and credit. The three first agreements provided for a refund out of the corporation's first net profits. The fourth contained no refund provision, but that agreement was made necessary only because through an error the one made a month before was unintentionally too small. By the fifth, or last, agreement the assessments paid thereunder were to be refunded before any dividends were declared and before any refund on account of prior assessments, but it was not stated that the refund should come out of the first net profits. Plaintiff signed the last agreement only, and paid the assessment therein called for; the previous assessments upon the shares of stock now held by him were paid by the then owners. It is held:
 - (1) Plaintiff was entitled to demand and receive a refund whenever the accumulation of the net profits, or surplus, equaled or ex-

CORPORATION—Continued.

ceeded the total amounts of all the assessments paid by all the shareowners.

- (2) This right of refund passed with the transfer of the shares from the holders thereof who had paid the first four assessments to plaintiff's assignor, and with the transfer from him to plaintiff.
 - -Cochrane v. Interstate Packing Co. 457.

AUTHORITY OF MANAGER TO MAKE WARRANTY.

- 12. The vice-president and general manager of the defendant, who had general charge of its office and plant, had authority to bind it by a warranty, though the making of warranties on the sale of seed-grain was contrary to the custom of the trade.
 - -Moorhead v. Minneapolis Seed Co. 11.

RATIFICATION OF STIPULATION BY DIRECTORS.

- 13. The circumstances leading up to the making of the stipulation for the settlement of the suits against defendant, and the subsequent conduct of the majority of its directors were such that the court might find a ratification thereof even though it was not signed by defendant's attorney, but by its president and secretary at the direction of such attorney, and even though the president and secretary were not directed, at a legally called meeting of the board of directors, to execute it.
 - -Dickinson v. Citizens Ice & Fuel Co. 201.

NOTICE TO CORPORATION.

- 14. What the directors as individuals knew in attempting to carry on the business of the corporation, the corporation must be held to know.
 - -Dickinson v. Citizens Ice & Fuel Co. 204.

MONEY RECEIVED.

- 15. Corporations, like individuals, may be held upon an implied promise to repay.
 - -Cochrane v. Interstate Packing Co. 457.

CLAIM AGAINST CORPORATION.

16. Claimants sold their stock of merchandise to a co-operative company, agreeing to look only to the proceeds of sales of stock for their pay. Part of the stock was already subscribed and was later paid for, and claimants received the proceeds. Held, the contract created

CORPORATION—Continued.

no claim against the corporation unless it was broken by the corporation.

-In re Dissolution of Blue Earth County Co-operative Co. 231.

INSOLVENCY.

ORDER FIXING TIME FOR HEARING CLAIM.

See APPEAL AND ERBOR, 6.

SAME - ALLOWANCE OF CLAIMS.

- 17. The question, in proceedings against an insolvent corporation under G. S. 1913, § 6634, whether certain creditors are entitled to share in the distribution of funds derived from the statutory liability of stockholders, cannot properly be raised by an objection to the aliowance of their claims, unless it affirmatively appears that the fund so to be raised is the only fund for distribution among the creditors, and for some valid reason the particular creditors are excluded from participating therein.
 - —Standard Lithographing & Printing Co. v. Twin City Motor Speedway Co. 120.
- 18. When it does not so affirmatively appear the question may be raised on the receiver's application for an order of distribution.
 - -Standard Lithographing & Printing Co. v. Twin City Motor Speedway Co. 120.

RECEIVER.

See APPEAL AND ERROR, 6, 9.

FOREIGN RAILWAY CORPORATION DOING BUSINESS IN MINNESOTA.
WHEN ITS SECURITIES ARE SUBJECT TO AN AD VALOREM TAX.

See TAXATION, 9.

COSTS.

PAYMENT OF COSTS UPON FORMER APPEAL TO ATTORNEY.

See APPEAL AND ERROR, 9.

PAYMENT OF COSTS ON APPEAL.

1. The decision in Peery v. Illinois Cent. R. Co. 123 Minn. 264, 143 N. W. 724, that G. S. 1913, § 7990—providing that the losing party, except when otherwise ordered by the court, shall pay the costs and disbursements before he shall be entitled to a remittitur—"refers only to costs and disbursements in the" supreme court, "and this court has no power to impose, as a condition to the granting of a re-

COSTS-Continued.

mittitur, the payment of any other sum," does not prevent the district court, of original and unlimited jurisdiction, from requiring payment of the judgment for costs and disbursements in the United States Supreme Court.

- -State ex rel. v. District Court of Ramsey County, 466, 467.
- 2. When a case is reversed in the supreme court and a judgment for costs entered there, whether the costs shall be paid as a condition precedent to remitting the case and its further prosecution in the court below, is a question exclusively for the supreme court. Under the decision in Fonda v. St. Paul City Ry. Co. 72 Minn. 1, 80 N. W. 366, it is probably correct that, when a case is remitted to the court below for a new trial, without conditions, the district court has no power to impose the condition of payment of the judgment in the supreme court.
 - -State ex rel. v. District Court of Ramsey County, 467.
- 3. That some court has the power, on a proper showing, to stay proceedings until the costs on appeal are paid, is not open to doubt. It is generally held that the trial court has this power.
 - -State ex rel. v. District Court of Ramsey County, 468.

COUNTY AND COUNTY OFFICERS.

COURT HOUSE.

- 1. A two-story frame building, which had been used as a village hall and engine house, was conveyed to defendant county by quitclaim deed "so long as the same shall be used for court house and county purposes," the title to revert to the grantor when the premises cease to be so used. The building was removed to land owned by the county. Partitions were constructed in the building to provide offices for county officials; doors, windows and chimneys were added, as were a stone foundation under the building and two fire proof vaults. The building has been used for 12 years as a court house, has a large room on the second floor, which is called a court room, and the offices are occupied by all the county officials, except the sheriff, county attorney and superintendent of schools. Held: The building is owned by the county and is a court house.
 - -Rydeen v. County of Clearwater, 331.

ISSUE OF BONDS FOR COURT HOUSE.

Clearwater county now owns a court house, and therefore cannot issue bonds for the erection of a new one without the approval at an elecCOUNTY AND COUNTY OFFICERS-Continued.

tion of a majority of the voters of the county. G. S. 1913, §§ 1854, 1855. Section 1934 does not apply.

-Rydeen v. County of Clearwater, 329.

COUNTY BOARD.

ORDER FOR REFUNDMENT OF TAX IS NOT AN ALLOWANCE OF A CLAIM AGAINST THE COUNTY.

See TAXATION, 19.

MAY TAKE TESTIMONY OF WITNESSES IN DITCH PROCEEDINGS WHEN NOT UNDER OATH.

See DRAIN, 4-6.

COUNTY AUDITOR.

ENTRY OF DATE OF TAX SALE IN COPY JUDGMENT BOOK.

See TAXATION, 20.

INDORSEMENT ON TAX CERTIFICATE THAT LAND IS UNREDEEMED.

See TAXATION, 25.

COUNTY OF CLEARWATER. See COUNTY AND COUNTY OFFICERS, 2.

COUNTY OF SIBLEY. See HIGHWAY, 1-4.

COURT. See EVIDENCE, 11.

NOT BOUND BY STIPULATION AS TO MATTER OF LAW WHICH AFFECTS PUBLIC INTERESTS.

See STIPULATION, 1.

DISTRICT COURT.

JURISDICTION OF ACTION TO RECOVER OVERCHARGE BY INTERSTATE CARRIER WHEN
VALIDITY OF PUBLISHED RATE IS NOT QUESTIONED.

See COMMERCE, 2.

JURISDICTION TO STAY PROCEEDINGS UNTIL PAYMENT OF COSTS IN UNITED STATES
SUPBEME COURT.

See APPEAL AND ERBOR, 23; COSTS, 3.

PAYMENT OF COSTS ON APPEAL TO SUPREME COURT AS CONDITION FOR A NEW TRIAL.

See Costs. 2.

1. It is well settled that the district court has the inherent power, not dependent on statutory authority, to stay proceedings in an action

COURT-Continued.

until a judgment for costs in a former action between the same parties, involving the same subject matter, or in the same action, has been paid, at least where the judgment is in the same court in which the new action is pending. 1 Notes on Minn. Reports, 186.

-State ex rel. v. District Court of Ramsey County, 466.

MUNICIPAL COURT.

WHEN JURISDICTION OF CRIMINAL OFFENSE IS EXCLUSIVE.

See CRIMINAL LAW, 1.

PRIORITY OF JURISDICTION.

2. On November 20 a summons was delivered to the sheriff, served on a local corporation and a return of "not found" as to the other defendants made by him. Immediately plaintiff filed an affidavit of publication and published the summons, and the affidavit and publication are conceded to be in proper form. On November 20 an order remanding the same action from the Federal court to the state court was filed. The first affidavit for publication, and the publication of the summons begun in the preceding August, were both defective and on December 26 were set aside by the state court. On November 9 the defendants in the state action began a suit in equity in the Federal court involving the same issues as the state action and gerved the plaintiff in this action personally. They then moved to abate the action in the state court or stay proceedings therein until the termination of the suit in the Federal court. Held: The state action was begun before the commencement of the Federal action. and is entitled to priority.

-McCormick v. Robinson, 483.

COURT HOUSE. See COUNTY AND COUNTY OFFICERS, 1, 2. COVENANT. See EVIDENCE, 14. CRIMINAL LAW.

WHEN JURISDICTION OF MUNICIPAL COURT IS EXCLUSIVE.

Where a criminal offense is committed within a city having a municipal court, the municipal court of another city has no jurisdiction of such offense either for the purpose of trial or for the purpose of holding a preliminary examination.

-State ex rel. v. Kelley, 462.

CIECUMSTANTIAL EVIDENCE.

2. Giving a brief correct instruction in respect to circumstantial evidence

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was proper, although the principal evidence for the prosecution was the testimony of an eyewitness.

-State v. Kampert, 136.

SENTENCE.

- 3. Where the statute requires both fine and imprisonment, defendant cannot complain of a sentence to imprisonment only.
 - -State v. Mamer, 266.
 - -State v. Radke, 276.

COMMENT BY PROSECUTING ATTORNEY.

- 4. The prosecuting attorney cross-examined defendant as to his reasons for refusing to permit his wife to testify, but discontinued that line of questions as soon as objection was made. In his address to the jury, he commented upon this testimony and upon defendant's failure to call his wife as a witness. It appeared defendant's wife was prosecuting an action for divorce against him and if permitted to testify would be a hostile witness. Held that, while the conduct of the prosecuting attorney is disapproved, it does not constitute reversible error under the circumstances disclosed.
 - -State v. Kampert, 138.

CERTIFICATION TO SUPREME COURT.

- 5. When a demurrer to an indictment is sustained the prosecution is at an end, unless submitted to another grand jury, and the trial court cannot thereafter certify to the supreme court the question involved by the demurrer.
 - -State v. Johnson, 500.

ERBOR NOT ASSIGNABLE ON JUDGE'S STATEMENT OF EVIDENCE.

- Errors cannot well be assigned upon the items of a statement of the trial judge as to what the evidence established. The ultimate finding to be made was whether defendant was guilty or not guilty of the offense charged.
 - -State v. Broms, 402.

CARNAL KNOWLEDGE OF CHILD.

7. At the close of the charge, defendant suggested that the jury should be directed to acquit unless they found that the offense had been committed at the place and under the circumstances testified to by

the eyewitness. Thereupon the court stated that the jury would not be warranted in convicting unless they found from all the evidence that defendant had committed the offense on or about November 4. As the evidence was directed to the proof of this single offense and there was no proof of any other, the failure to define the offense more specifically was not error.

- -State v. Kampert, 135.
- 8. The eyewithess to the offense testified that it was committed on either November 4, 5, or 6, 1915, that she believed it was before the sixth, but could not say so positively. Under this testimony an instruction that the jury must acquit unless they found that the act was committed on either the fourth or fifth was properly refused.
 - -State v. Kampert, 132.

DISORDERLY CONDUCT.

- 9. Prosecution for violation of a city ordinance relating to breaches of the peace and disorderly conduct. The complaint on the "tab" of the clerk of court was substantially in the wording of the ordinance. Evidence that defendant publicly denounced President Wilson and Governor Burnquist as grafters and that the President was a lawbreaker in sending drafted men out of the country to fight. Held:
 - (1) The complaint is sufficient under State v. Olson, 115 Minn. 153, 131 N. W. 1084.
 - (2) The evidence sustained the conviction.
 - -State v. Broms, 402.

SAME-NO RIGHT TO JURY TRIAL.

- The prosecution being under an ordinance defendant was not entitled to a jury.
 - -State v. Broms, 402.

GAMBLING.

- 11. The charge of the court discussed the evidence and indulged in inferences to a greater extent than is commendable, but it emphasized to the jury that all questions of fact were for their determination, and impressed so strongly that, if certain contentions of defendant were true, they must acquit, that this court cannot say there was error prejudicial to the defendant.
 - -State v. Kearns, 89.

GRAND LARGENY.

- 12. Defendant was convicted of grand larceny of an automobile. The indictment charged that defendant being in possession of the machine as a bailee and authorized to take possession of it, feloniously appropriated it to his own use. Held:
 - (1) The indictment followed the language of G. S. 1913, § 8870, subd. 2, and was sufficient.
 - (2) The evidence, though conflicting and not at all conclusive of guilt, justified the verdict.
 - -State v. Marx, 448.
- 13. Defendant's brother testified as a witness on behalf of defendant. On cross-examination he was asked if he did not say to the complaining witness that his brother was a "crook." He denied making such statement. His answer was final, and it was prejudicial error to permit complaining witness to testify in rebuttal that the witness made such statement to her.
 - -State v. Marx, 448.

ILLEGAL SALE OF INTOXICATING LIQUOR.

- Prosecution and conviction for the illegal sale of intoxicating liquor. Held: The evidence sustained the verdict.
 - -State v. Mamer, 265.
- 15. There was no error in an instruction that the jury might consider evidence that defendant had offered to plead guilty of this very sale, if true, as an admission of guilt on the part of defendant.
 - -State v. Mamer, 266.
- 16. Evidence that Sorenson, the prosecuting witness, who was thoroughly familiar with the neighborhood, was sober when he met Flannigan, another witness for the state, that Flannigan gave him a dollar and within a few minutes Sorenson met Flannigan at a secluded spot a few blocks from defendant's soft-drinks-parlor and produced a pint bottle of whiskey which the witness drank. Sorenson later became drunk, was arrested about noon, and at the preliminary examination late in the afternoon testified he bought the liquor of defendant. Held: The evidence is sufficient to sustain the conviction.
 - -State v. Van Vleet, 144, 147.

- 17. An instruction that it made no difference by what name the liquor was called so long as it was intoxicating was clearly proper.
 - -State v. Radke, 276.
- 18. An instruction that defendant might be convicted on proof of commission of the offense charged at any time within three years was not prejudicial error, the evidence having been devoted wholly to proof of a particular offense on a particular day.
 - -State v. Radke. 276.
- 19. Liquor in considerable quantity was found on defendant's premises. Two witnesses not of high character swore to the commission of the particular offense charged, but they were corroborated by some undisputed facts. Held: The evidence sustains the verdict of guilty. —State v. Radke, 276, 277.

KEEPING UNLICENSED DRINKING PLACE.

- 20. Disputed evidence that defendant's servant in charge of the office at one of its freight stations received money from a person who came and got liquor consigned to fictitious persons, delivered it to those who sent him for it and charged them the cost of the liquor, plus the amount for delivery. Held: The evidence did not sustain a conviction for keeping an unlicensed drinking place in violation of G. S. 1913. § 3169.
 - -State v. Northern Pacific Railway Co. 334.

DAMAGES. See MASTER AND SERVANT. 15.

MEASURE OF DAMAGES WHEN FAILURE OF GERMINATING POWER IN SEED SOLD.

See SALE, 13.

MEASURE OF DAMAGES WHERE BUILDING CONTRACTOR HAS SUBSTANTIALLY PERFORMED HIS CONTRACT, THOUGH THERE ARE MINOR DEFECTS.

See CONTRACT, 8, 9.

SUBMISSION OF QUESTION OF DAMAGES IN APPEAL IN HIGHWAY PROCEEDING.

See HIGHWAY, 3.

OMISSION OF NOMINAL DAMAGES FROM JUDGMENT NOT REVIEWABLE ON APPEAL FROM JUDGMENT.

See APPEAL AND ERBOR, 17, 19.



DAMAGES-Continued.

IN ACTION FOR BREACH OF CONTRACT-NOT EXCESSIVE.

- 1. Verdict for \$4,600. Proof that the average amount of work done by the welding plant sold was over \$200 per month for 41 months, and that the profit was 70 per cent. Held: It does not appear that the verdict was given under the influence of passion or prejudice, or that it is excessive, and it was supported by the evidence.
 - -Lewistown Iron Works v. Vulcan Process Co. 181, 186.

IN ACTION FOR DEATH BY WRONGFUL ACT-NOT EXCESSIVE.

- Action for death of child of 5 years. The verdict for \$4,000 was reduced by the trial court to \$3,400. Held not excessive.
 - -Drimel v. Union Power Co. 123.

IN ACTION FOR MALICIOUS PROSECUTION-EXCESSIVE.

3. Plaintiff occupied a dwelling house belonging to defendant. Defendant terminated the tenancy and plaintiff moved. Plaintiff was arrested for malicious destruction of property, tried and acquitted. He was arrested at 8 a. m., taken to municipal court and locked in with other prisoners until 11:30 a. m., when he was taken to the county jail and held until noon when he was released on bail. He brought this action for malicious prosecution. Verdict for \$1,125. Held: The verdict was excessive, and the court granted a new trial unless plaintiff consented to a reduction of the verdict to \$600.

--Jones v. Flaherty, 100.

IN ACTION FOR PERSONAL INJURY-NOT EXCESSIVE.

4. Verdict for \$9,000 reduced to \$6,000 by the trial court. Evidence that the right hip was entirely free of skin and muscle-covering for a space of 5x4 inches, and it was necessary to graft skin upon it; that the fat and skin between the legs were badly discolored; that the little finger of the right hand was broken and the muscles of the hand torn; that he had other injuries; that plaintiff remained in precarious condition for 3 days and in the hospital for nearly 5 months. Held: There was no ground for reversing the verdict.

-Moscrip v. Great Northern Railway Co. 494.

SAME-EXCESSIVE.

See MASTER AND SERVANT, 15.

IN ACTION FOR SEDUCTION-NOT EXCESSIVE.

5. Court charged the jury that in assessing the damages of plaintiff they might take into consideration the loss of the services of his

DAMAGES-Continued.

daughter, the expenses connected with her confinement, the plaintiff's wounded feelings and mental anxiety, and the dishonor to plaintiff and his family, and this was right. The case was one for punitive damages. *Held*: The damages are not excessive.

-Haeissig v. Decker, 422.

DEATH.

ALLOWANCE FOR LAST SICKNESS AND BURIAL UNDER WORKMEN'S COMPENSATION
ACT SUSTAINED.

See WORKMEN'S COMPENSATION ACT, 8.

DEATH BY WRONGFUL ACT. See MASTER AND SERVANT, 12, 14.

- The evidence did not show, as a matter of law, that the parents of the child, who are the sole beneficiaries of this action, were negligent.
 - -Drimel v. Union Power Co. 123.
- Requests to instruct the jury, made by plaintiff, considered, and held
 to have been properly refused, under the issues and proof in the
 case.
 - -Kelly v. McKeown, 285.

DAMAGES.

See DAMAGES, 2.

DEED. See EVIDENCE, 14.

SEPARATE DEEDS BY INDIVIDUAL PARTNERS HAVE SAME EFFECT AS DEED IN THE NAME OF FIBM.

See Good WILL, 2.

UNDUE INFLUENCE.

- 1. The evidence in this case sustains the finding of the trial court that a deed from father to son was procured by undue influence. A similar decision on a former trial was reversed by this court on the ground that it was not sustained by the evidence. The evidence on the second trial was not the same. The former decision of this court is not res adjudicata. Whether the former decision would be res adjudicata if the evidence were the same on both trials is not decided.
 - -Thill v. Freiermuth, 78.

DEED-Continued.

RESCISSION OF AGREEMENT FOR SUPPORT OF GRANTORS.

2. In a transaction by which the parents conveyed certain real property to their son, in consideration of a written agreement on his part to make provision for their support during the remainder of their lives, and also to pay certain specified sums of money to other children of the grantors, all of mature years, but not parties to the contract, within six months after the death of the parents, which payments were declared by the contract liens upon the property until paid,

It is held that the provision for the payments to the other children was not founded upon a valuable consideration, was a mere incident to the main contract, created no irrevocable rights in such other children, and that the obligation to make the payments was discharged and the liens abrogated upon the reseission and abandonment of the contract by the parties thereto and a reconveyance of the property to the parents.

-Emkee v. Ahston, 443.

DISCRETION OF COURT. See HIGHWAY, 3; INSURANCE, 3; JUDGMENT, 3; NEW TRIAL; PLEADING; WITNESS, 3.

DISMISSAL AND NONSUIT. See ATTORNEY AND CLIENT, 3; GUARANTY, 1.

WRONG REASON OF COURT FOR RIGHT ACTION.

See CARRIER, 12.

DISMISSAL OF APPEAL.

See APPEAL AND ERROR, 1, 4, 6-9.

DISMISSAL OF APPEAL FROM THE COUNTY BOARD.

See TAXATION, 19.

DISORDERLY CONDUCT. See Constitution, 6; Chiminal Law, 9, 10.

DISTANCE TARIFF ACT. See CARRIER, 1, 2.

DOMICILE.

STATUTORY DOMICILE OF CORPORATION IN ONE STATE AND BUSINESS IN ANOTHER.

See TAXATION, 14.

DRAIN.

OWNERS ESTOPPED AGAINST CLOSING COMMON DITCH.

 Where landowners, to drain or improve their several holdings, pursuant to a mutual understanding unite in constructing a drainage

DRAIN-Continued.

ditch, each of the owners is thereafter estopped from closing the ditch whereby the others are deprived of the drainage provided. This rule, announced in Munsch v. Stetler, 109 Minn. 403, 124 N. W. 14. controls the decision herein.

- -Stoering v. Swanson, 115.
- 2. The estoppel came into being as soon as the ditch was so established. And it was not thereafter lost by a failure to assert dominion over the ditch upon the land of the other interested parties so long as they did not create an obstruction to the flow of the water therein.
 - -Stoering v. Swanson, 115.

JUDICIAL DITCH.

- The evidence justified the court in finding that the benefits to be derived from the proposed ditch would not exceed the cost of constructing it.
 - -In re Judicial Ditch No. 2, Itasca County, 332.

REQUIRING WITNESS TO BE SWORN.

- The board of county commissioners may, in county ditch proceedings, hear parties and witnesses who appear before them without administering an oath.
 - -State ex rel. v. Truax, 313.
- 5. The statute which authorizes them to hear and consider the testimony of parties, viewers, and engineers, and other admissible testimony, is not a mandate to the board to hear no person except under oath.
 - -State ex rel. v. Truax, 313.

HEARING BEFORE COUNTY BOARD.

- 6. The functions of the county board in a ditch proceeding are primarily legislative and only quasi judicial. The county board is not a court. Its proceedings are not proceedings in court. The are necessarily informal. The members are usually not lawyers. They are not governed by legal rules of evidence.
 - -State ex rel. v. Truax, 315.

OBSTRUCTION IN DITCH.

- The evidence sustains the finding that plaintiff placed a dam or
 obstruction in the ditch which diminished the capacity it originally
 had for drainage.
 - -Stoering v. Swanson, 115.

DRAIN-Continued.

- Plaintiff cannot raise the objection that the water from defendants' lands reach the county ditch for the establishment of which such lands have not been assessed.
 - -Stoering v. Swanson, 115.

EASEMENT.

- A right given by the owner of a building to the owner of an adjoining building to use a stairway and passageway in the first building for access to the second floor of the adjoining building, does not grant an easement in the land, and is lost when the building, including the stairway and passageway, is destroyed by fire without the fault of the owner, and not restored by the construction of a new building and stairway in place of the old.
 - -Brechet v. Johnson Hardware Co. 436.

ELECTRICITY. See TRIAL, 4.

MEASURE OF DEFENDANT'S DUTY.

- The measure of defendant's duty was the exercise of ordinary care.
 Its electric light and power plant was using a dangerous agent. If not controlled and guarded it might do great injury. The amount of care required to constitute ordinary care under such circumstances is care commensurate with reasonably apprehended dangers and risks.
 - -Drimel v. Union Power Co. 125.

NOTICE OF DEFECT.

- 2. The plaintiff's intestate, a child between 5 and 6 years old, was killed by coming in contact with a wire of a fence which had been electrified by a live wire of the defendant, on one of its transmission lines, which broke and fell upon it. The wire broke at 4:30 in the morning and the plaintiff's intestate was killed about 8:30. Assuming that the break was caused by lightning, and therefore that the defendant was not responsible for it, it was a question of fact for the jury whether the defendant, having notice at 4:30, by means of instruments in its plant provided for such purpose, of disturbances on its line, and of the probable breaking of two wires, was negligent in failing sooner to locate the break and prevent harm coming from it.

 —Drimel v. Union Power Co. 122.
 - NEGLIGENCE OF PARENTS.
- 3. About 6 a. m. plaintiff, when getting his cows, saw that a wire was

ELECTRICITY—Continued.

down and some fence posts were burning. He told his wife. They purposely kept information from their children. About 7 a.m. plaintiff went to town. The children were playing about the house and their mother, engaged in her household work, did not notice their leaving. Going out on the public road when they came to a lane where the fence posts were burning at a distance of 500 feet from the house, they went to them. Upon these facts negligence of the parents as a matter of law cannot be based.

-Drimel v. Union Power Co. 126.

EMINENT DOMAIN. See STATUTE, 1.

CONDEMNATION FOR PUBLIC PARK.

- 1. The board of park commissioners of the city of Minneapolis under the authority conferred by chapter 30, Sp. Laws 1889, may condemn for park purposes a tract of land adjoining another tract lying partly within and partly without the municipal limits, theretofore acquired by the city for the same purpose, the two tracts forming one compact whole, though the tract so sought to be taken is outside of and beyond the city limits and not contiguous to the boundary line thereof.
 - -Hobart v. City of Minneapolis, 368.
- The land so taken and condemned will in that situation be "adjacent" to the city within the meaning of the statute.
 - -Hobart v. City of Minneapolis, 368.

PROCEEDINGS PRESUMED VALID.

- 3. Proceedings before a legislative body authorized by statute to take and condemn private property for a public use, in the absence of some showing to the contrary, will be presumed by the courts to have been in compliance with the requirements of the law authorizing the same.
 - -Hobart v. City of Minneapolis, 368.

ESPIONAGE LAW.

ACT NOT ABROGATED BY LAWS 1917, P. 764, C. 463.

See ARMY AND NAVY. 1.

ESTOPPEL.

OF TENANT.

See Landlord and Tenant, 1.

ESTOPPEL-Continued.

WHERE DEFENSE IS NOT AVAILABLE TO CONSIGNEE.

See CARRIER, 11.

OF LANDOWNERS FROM CLOSING DITCH.

See DRAIN, 1, 2.

- 1. In 1909 plaintiff's husband executed and delivered to defendants a warranty deed of land owned by him. The deed appeared on its face to have been executed and acknowledged by plaintiff, but in fact she did not execute or acknowledge it. In this action brought in 1915, in which plaintiff claims an undivided one-third interest in the land, her husband having died in 1910, it is held that the findings to the effect that plaintiff had full knowledge of the transaction immediately after it occurred, acquiesced therein, accepted and retained the benefits thereof, are sustained by the evidence, and warrant the conclusion that plaintiff is equitably estopped from maintaining the action.
 - -Fuller v. Johnson, 110.
- Where defendant obtained an advantage of admitted value from a stipulation for the settlement of litigation, it should not be allowed to repudiate it because it was improvidently made.
 - -Dickinson v. Citizens Ice & Fuel Co. 205.

SALE BY APPARENT OWNER - INNOCENT PURCHASER PROTECTED.

TRUE OWNER ESTOPPED FROM QUESTIONING TITLE OF INNOCENT PURCHASER FOR VALUE FROM THIRD PERSON.

See REPLEVIN.

- 3. Where the true owner of personal property allows another to appear as the owner of and as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, the owner thereof will be estopped from questioning the title of such innocent purchaser to such property.
 - -Olsen v. Great Northern Railway Co. 316.

EVIDENCE.

JUDICIAL NOTICE.

- Bonds of the United States are recognized by our statutes and by everybody as the very safest investments.
 - -Trumer v. South Side State Bank, 226.

EVIDENCE—Continued.

- The court must take judicial notice that January 9, 1916, was Sunday.
 - -Hughes v. Globe Indemnity Co. 421.
- 3. The wilful omission to list credits for taxation or a false listing is a species of active dishonesty. We cannot assume it to be so prevalent that an unexplained omission to list is without significance. Instead we ought to assume that men generally respond to the call of good citizenship and honestly report their credits.
 - -Thaden v. Bagan, 51.

PRESUMPTION.

See TAXATION, 18.

OF FRAUD.

See Corporation, 3.

WHEN LEGISLATURE CAN MAKE PRESUMPTION CONCLUSIVE.

See Constitution, 2.

CONSIGNEE CONCLUSIVELY PRESUMED TO KNOW LEGAL RATE FOR SHIPMENT IN PUBLISHED TARIFF.

See CARRIER, 11.

CONCLUSIVE PRESUMPTION THAT SURVIVING WIFE WAS WHOLLY DEPENDENT UPON HER HUSBAND.

See Workmen's Compensation Act, 5.

THAT CONDEMNATION PROCEEDINGS AUTHORIZED BY STATUTE ARE IN COMPLIANCE WITH THE REQUIREMENTS OF STATUTE.

See EMINENT DOMAIN, 3.

- 4. In declaring that a particular fact shall be conclusively presumed, the legislature does not establish a rule of presumption in the ordinary sense of the term, but rather a rule of law to the effect that in the case specified the nonexistence of the fact presumed is immaterial.
 - -State ex rel. v. District Court of Hennepin County, 411.
- 5. The presumption that a properly mailed letter will, in the due course of mail, reach the person to whom it is addressed has application only where the act of mailing is unquestioned or conclusively shown.
 - -Suits v. Order of United Commercial Travelers, 246.

EVIDENCE-Continued.

BURDEN OF PROOF.

See APPEAL AND ERROR, 18; SALE, 4.

EXCLUSION OF INCOMPETENT EVIDENCE.

See HIGHWAY, 5.

MATERIAL EVIDENCE.

OFFER OF PROOF.

6. There must be an offer showing the materiality of proffered testimony unless it otherwise appears or is presumptively material.

-Thaden v. Bagan, 49.

SAME - SUBPOENA TO WITNESS.

 Ordinarily it is not material for the jury to know whether plaintiff or defendant subpœnaed a witness who has given important testimony on a vital issue in the case.

-Barrett v. Van Duzee, 351.

ADMISSION.

See CRIMINAL LAW. 15.

8. The omission of the plaintiff to list for taxation as a credit his claim for compensation as required by G. S. 1913, § 2316 et seq. was proper to be shown as an admission against the validity of it.

-Thaden v. Bagan, 47.

STIPULATION AS TO MAILING AND RECEIPT OF LETTER.

See LETTER.

RECITAL IN TAX RECEIFT NOT PROOF THAT LAND WAS ASSESSED IN THE NAME OF THAT PERSON.

See TAXATION, 18.

STATUTORY EFFECT OF TAX CERTIFICATE AFTER EXPIRATION OF TIME FOR REDEMPTION.

See TAXATION, 26.

DOCUMENTARY.

See Insurance, 2.

9. There is nothing in G. S. 1913, § 8375, subd. 5, prohibiting public officers from disclosing communications made to them in official confidence when the public interest would suffer from the disclosure,

EVIDENCE-Continued.

which prevents defendant from showing that plaintiff did not list for taxation as a credit his claim against defendant. This provision particularly refers to matters affecting the affairs of the state, as state secrets and communications by informers.

- -Thaden v. Bagan, 49, 51.
- 10. The defendants might show plaintiff's omission to list a credit for taxation by the tax lists or they might take the statement of the defendant as to the fact when on the stand, and neither the provision of the tax law, G. S. 1913, § 2320, prohibiting a disclosure of the lists by the tax officers "except by order of court," nor the provision of G. S. 1913, § 8375, subd. 5, prohibiting public officers from disclosing communications made to them in official confidence when the public interest would suffer from such disclosure, gives a privilege against disclosure.
 - -Thaden v. Bagan, 47.
- 11. The exception in G. S. 1913, § 2320, that "except by order of court" the details in the tax lists made by taxpayers shall not be disclosed, intends that when an issue is on trial, upon which a disclosure is material, the court may require it, and its ruling shall be obeyed. It does not limit the duty of disclosure to a case where the public revenue is directly involved. It does not restrict courts in their judicial investigations nor make their rulings discretionary. Saving obedience to the ruling of the court, the prohibition is absolute.

-Thaden v. Bagan, 50.

PAROL EVIDENCE TO VARY INDORSEMENT.

12. The rule that upon the transfer of a promissory note the effect of the payee's indorsement cannot be varied by parol does not prevent the showing of want of consideration or that paper is accommodation.
—State Bank of Willow River v. Pangerl, 19.

PAROL EVIDENCE OF PROMISES AT VARIANCE WITH WRITTEN CONTRACT.

- 13. Evidence of fraudulent promissory representations made with no intention to keep them and solely for the purpose of inducing another to enter a contract may be proven, though at variance with the written contract.
 - -Nelson v. Berkner, 301.
- 14. A deed contained a covenant that the premises were free from all incumbrances except certain liens created by a specified contract of support, "in case said liens have any validity." In an action



EVIDENCE—Continued.

to determine adverse claims, defendants offered evidence to show that plaintiffs knew of the liens and purchased the property subject thereto. The contract of purchase contained the same phrase in regard to the validity of the liens. *Held*: No absolute liability verbally created could be shown and the court properly excluded the testimony.

-Emkee v. Ahston, 445, 447.

OPINION EVIDENCE.

- 15. A physician who had treated plaintiff was asked whether from examination of the patient and knowledge of the case plaintiff was capable of performing his duties as a salesman. Held: It was competent for the witness as an expert to state whether in his opinion plaintiff was capable of engaging in physical and mental exertion and to what extent.
 - -McKay v. Minnesota Commercial Men's Assn. 195, 196.

OF VALUE OF USE OF LAND.

See SALE, 15.

OF CHARACTER OF SUBSOIL AND MARKET VALUE OF FARM TO PROVE MISREPRESENTATION THAT FARM WAS AS GOOD AS ANY IN THE COUNTY.

See VENDOR AND PURCHASER, 7.

OF PROFIT FROM WORK LOST IN ESTIMATING DAMAGES.

See SALE, 10.

OF EXPERT IN HANDWRITING.

See GUARANTY, 1.

CIBCUMSTANTIAL EVIDENCE.

See CRIMINAL LAW, 2.

EXCHANGE OF PROPERTY. See BROKER, 3.

RESCISION FOR FRAUD.

In an action for specific performance of a contract for the exchange of properties, the defense was that plaintiff by false and fraudulent representations induced the deal. The court found this defense not proven. The title to part of the property which plaintiff agreed to transfer had been seized in an abatement proceeding, but was being

EXCHANGE OF PROPERTY-Continued.

used in the business which defendant Halk received from plaintiff. After Halk learned of the proceeding he nevertheless remained in the undisturbed possession of the property transferred to him for more than two months, and abandoned it on the day the title was perfected by plaintiff. It is held Halk was not entitled at that time to rescind; the contract not having been induced by fraud.

-Abernethy v. Halk, 252.

EXECUTION.

No Attorney's Fees Allowed Receiver in Supplementary Proceeding.

A receiver appointed in proceedings supplementary to execution, solely in the interests of a particular creditor, is not entitled to attorney's fees for the prosecution of an action to set aside an alleged fraudulent conveyance of property, where the creditor could have maintained the same action in his own name without resorting to the receivership proceedings.

-Small v. Anderson, 292.

EXEMPTION.

OF MINNEAPOLIS & St. CLOUD RAILBOAD COMPANY FROM TAXATION.

See TAXATION, 15.

EXPLOSIVE.

Action against retailer for personal injury to young child caused by a candy "sparkler." Verdict for plaintiff. Appeal from denial of motion for judgment notwithstanding. Ordinance No. 2395 of city of St. Paul, prohibiting the sale of "explosives, firecrackers or fireworks" was introduced in evidence. *Held*: The ordinance prohibits the sale of such explosives only as are dangerous to persons or property on account of their dangerous character as an explosive, and it was error to admit the ordinance in evidence.

-Schmidt v. Capital Candy Co. 378, 381.

FEDERAL EMPLOYER'S LIABILITY ACT. See MASTER AND SERVANT, 14, 15. FIRE.

EASEMENT TO USE STAIRWAY TERMINATED WHEN BUILDING WAS DESTROYED BY FIRE.

See EASEMENT.

FIRE ESCAPE.

EQUIPMENT OF RESTAURANT WITH FIRE ESCAPES.

See HEALTH: LANDLORD AND TENANT, 2.

FORFEITURE. See INSURANCE, 10: VENDOR AND PURCHASER, 4.

WAIVER.

See Insurance, 4.

FORGERY. See STATE, 1.

FRAUD.

CONSTRUCTIVE FRAUD IN SALE OF STOCK IN CORPORATION.

See Corporation, 2.

IN APPLICATION FOR INSURANCE.

See INSUBANCE, 4.

ACTION FOR DECEIT.

SURVIVES THE DEATH OF EITHER PARTY AND IS ASSIGNABLE.

See Assignment.

FRAUDS (STATUTE OF).

OBAL WARRANTY WITHIN THE STATUTE OF FRAUDS NOT ANNULLED BY PRINTED DISCLAIMERS OF WARRANTY UPON INVOICE AND SHIPPING TAGS.

See SALE, 5.

WHEN LAW OF IOWA GOVERNS.

See CONTRACT, 1.

- A statement of the consideration not being necessary at common law, the court will not assume that such statement is required by the statute law of Iowa.
 - -Matson v. Bauman, 299, 300.

PART PERFORMANCE.

2. Defendant agreed orally to build a house and convey house and lot to plaintiff for \$1,500. Plaintiff agreed to pay \$10 per month commencing with occupancy and the taxes which defendant paid from year to year. The sum of \$1,500 bore interest at 6 per cent from the date the house was completed. Plaintiff took possession of the lot in April, 1911, and in reliance on the agreement built a barn in which he lived until the house was completed, and made other substantial improvements. Defendant completed the house about De-

FRAUDS (STATUTE OF)—Continued.

cember 1, 1911, and since that time it has been occupied by plaintiff. Plaintiff was working for defendant and from time to time during the first 4 years his earnings to the amount of \$798.30 were credited upon the contract or payments made, most of the payments in advance of accrual. *Held*: This was such part performance by plaintiff that the contract was taken out of the statute of frauds.

-Porten v. Peterson, 154.

FRAUDULENT CONVEYANCE.

HOMESTEAD OF INSOLVENT DERTOR.

- The rule stated and applied in Jacoby v. Parkland Distilling Co., 41 Minn. 227, 43 N. W. 52, should not be extended to a case where the debtor has existing homestead rights in property standing of record in the wife's name.
 - -Small v. Anderson, 292.
- 2. A judgment debtor transferred to his wife all his unexempt property, in consideration of a transfer by the wife to him of certain real property which the debtor thereafter claimed as his homestead, and as such exempt from sale on execution. His claim was that the transaction was had for the sole purpose of acquiring a homestead, but the evidence tended to show that the parties then occupied the particular property as a family home, though the title was of record in the wife's name.

It is held that the findings of the trial court to the effect that the transaction was entered into by the parties for the purpose of defrauding the creditors of the husband are sustained by the evidence.

-Small v. Anderson, 292.

FREEDOM OF SPEECH. See Constitution, 6.

GAMBLING. See CRIMINAL LAW, 11.

GARNISHMENT.

LIABILITY OF INSURER UPON POLICY.

Judgment having been entered against defendant upon a claim against which the casualty company had insured him under a policy substantially the same in effect as the policy considered in Patterson v. Adan, 119 Minn. 308, 138 N. W. 281, the liability of the company upon its policy was subject to garnishment under the rule announced in that case and followed in subsequent cases.

-Powers v. Wilson, 309.

GAS.

ARBITRATION TO FIX RATE.

- The provisions for arbitrating the rates to be charged by defendant, the holder of a franchise contract, for furnishing the city of Red Wing and its inhabitants with gas, apply to the rates to the private consumers as well as to the municipality.
 - —City of Red Wing v. Wisconsin-Minnesota Light & Power Co. 240.
- 2. The city has an interest in maintaining the arbitration provision of the franchise in behalf of its inhabitants for whom it acted when granting the franchise; and since the right of the city and its inhabitants to relief rests upon common ground, this action to restrain defendant from putting increased gas rates into effect will lie if there be a threatened breach of the contract as to the gas consuming inhabitants, for thereby a multiplicity of suits is avoided.
 - -City of Red Wing v. Wisconsin-Minnesota Light & Power Co. 240.

GOOD WILL

FIRM NAME PASSES WITH SALE OF BUSINESS.

- The name of a copartnership is an essential element of the partnership enterprise, an asset thereof, and passes with a sale of the firm business and good will.
 - -Twin City Brief Printing Co. v. Review Publishing Co. 358.
- 2. Where a sale of the entire business and property of a copartnership, including the good will, is a firm transaction, separate conveyances by the individual copartners have the same force and effect as a single conveyance executed in the name of the firm; and a transfer, thus effected, carries with it the right in the purchaser to the future use of the copartnership name.
 - -Twin City Brief Printing Co. v. Review Publishing Co. 358.
- 3. Defendant Review Publishing Company, a corporation doing a job printing business in St. Paul, expressly consented that a copartnership formed by its managing officer and those associated with him for the transaction of a similar printing business in the adjoining city of Minneapolis might use the name Review Publishing Company in its business affairs in that city; under that authority the copartnership adopted that name, and thereunder built up and established a prosperous printing business to the knowledge of defendant and its said managing officer.

GOOD WILL-Continued.

Plaintiff, Twin City Brief Printing Company, a corporation, was organized by some of those interested in the copartnership for the purpose of taking over the partnership business; in consummation of that purpose the individual copartners executed to plaintiff separate bills of sale of the partnership plant, property, assets, and good will. The corporation thereafter for several years continued the business under the name stated precisely as the copartnership theretofore had done. Defendant thereafter established a branch department of its printing business in Minneapolis, and by unfair and deceptive methods attempted to divert to its office the business so built up and established by the copartnership and plaintiff.

It is held:

- (1) That the copartnership acquired by the consent and acquiescence of defendant corporation the right to use the particular name in the firm transactions in Minneapolis; that right passed to plaintiff on the sale to it of the partnership property, effects, and good will, and defendants may be restrained from unfairly and wrongfully interfering in the use thereof by plaintiff in that city, and by deceptive methods from attempting to divert to its branch office business that otherwise would go to plaintiff.
- (2) The facts stated in the opinion entitle plaintiff to the relief substantially as prayed for in the complaint, against all the defendants.

—Twin City Brief Printing Co. v. Review Publishing Co. 358, 359. GRAIN.

WARRANTY OF GERMINATING POWER.

See SALE, 5, 12.

DESTRUCTION BY FIRE WHILE IN CAB ON ELEVATOR TRACK AFTER ISSUE OF BILL OF LADING.

See Insurance, 8, 9.

GUARANTY.

EXECUTION.

1. Action on guaranty. Defendant testified she did not sign it. Evidence of expert in handwriting that it and two admittedly genuine

GUARANTY—Continued.

signatures were in the same handwriting. Judgment of dismissal. On appeal from the judgment, held that the evidence made the question of execution one for the jury.

- -Bradshaw v. Hoff, 503.
- On a second trial the evidence did not change the material facts or qualify defendant's liability as expressed in the written contract. The decision on the former appeal is therefore followed.
 - -Bradshaw v. Sibert, 490.

CONTINUING GUARANTY.

- A surety on a continuing guaranty has a right to stand on the precise terms of his contract. He can be held to no other or different contract.
 - -Stone-Ordean-Wells Co. v. Taylor, 432.

DISCHARGE OF COGUARANTOR.

- 4. One of two guarantors on a continuing guaranty gave written notice to the holder of the guaranty that he would not be responsible thereafter, and receipt of his letter was acknowledged. The other guarantor was not notified by either party. Held: The discharge of one of the cosureties on a continuing guaranty affects the contract as to all, and amounts to a release of the other cosureties for liabilities subsequently incurred.
 - -Stone-Ordean-Wells Co. v. Taylor, 432,

HEALTH.

FIRE ESCAPE.

- A restaurant, conducted in a room on the third floor of a four-story building, wherein there are no sleeping rooms, does not come within the operation of section 5120, G. S. 1913, requiring the building to be equipped with fire escapes or facilities for the prevention of fires.
 - -Arcade Investment Co. v. Hawley, 27.

HIGHWAY.

APPEAL FROM DECISION OF LOCAL BOARD.

In proceedings for the establishment of public improvements, authorized by law to be heard and determined by local municipal boards and officers, all questions in respect to the propriety and necessity of the particular improvement are legislative in character, and the

HIGHWAY-Continued.

determination thereof by the local tribunal is final, and will be set aside by the court on the statutory appeal only when it appears that the evidence is practically conclusive against it, or that the local board proceeded on an erroneous theory of the law, or arbitrarily and against the best interests of the public.

- -Brazil v. County of Sibley, 458.
- The appeal does not bring up such matters for determination by the court de novo, and the trial court erred in submitting the same to the jury in this cause as an original question.
 - -Brazil v. County of Sibley, 459.
- In appeals in highway proceedings the court, in its discretion, may submit specific issues to a jury, as in civil actions, such as questions of damages.
 - -Brazil v. County of Sibley, 459.
- 4. From section 2550, G. S. 1913, in reference to the hearing of appeals from the decision of local municipal boards in respect to town roads, it seems clear that the legislature intended a trial of such appeal in harmony with the usual court procedure.
 - -Brazil v. County of Sibley, 460.

EVIDENCE.

- 5. Petition for laying out road denied by town board. On appeal to the district court the jury reversed the order of the board. On appeal by town board, held: (1) The evidence supported the verdict; (2) the court did not err in excluding a remonstrance against the road signed by many freeholders; and (3) the court did not err in denying a new trial because of cumulative evidence newly discovered.
 - -Trenda v. Town Board of Wheatland, 493.

OWNERSHIP OF AUTOMOBILE.

- 6. Action for negligence in operation of automobile. Question whether defendant or his son, who was driving, was the owner of the car. Father's testimony was that he sold the machine to his son, but the transaction was left vague and uncertain. By G. S. 1913, § 2643, the registration in the name of the father was prima facie evidence of ownership. Held: The evidence sustains a finding that defendant was the owner at the time of the collision.
 - -Uphoff v. McCormick, 392.

HIGHWAY-Continued.

AUTHORIZED USE OF AUTOMOBILE.

7. Defendant's son and daughter were returning from a dance. Defendant knew they were going. The evidence sustains a finding that the auto was used at the time with authority of the defendant for family purposes for which it was kept and that he was liable for the negligence of the driver.

-Uphoff v. McCormick, 392.

HOMESTEAD.

TRANSFER TO INSOLVENT DEBTOR.

See Fraudulent Conveyance, 1, 2.

HUSBAND AND WIFE.

PERFORMANCE OF HUSBAND'S CONTRACT BY WIFE.

See WORK AND LABOR, 1.

WIFE ESTOPPED FROM MAINTAINING ACTION IN PARTITION.

See ESTOPPEL, 1.

TRANSFER OF HOMESTEAD TO INSOLVENT HUSBAND.

See FRAUDULENT CONVEYANCE. 2.

REFUSAL OF HUSBAND TO PERMIT HIS WIFE TO TESTIFY.

See CRIMINAL LAW, 4.

PRESUMPTION THAT SURVIVING WIFE WAS WHOLLY DEPENDENT UPON HER HUSBAND.

See Workmen's Compensation Act, 5.

INDICTMENT AND INFORMATION. See CRIMINAL LAW, 5.

INDICTMENT FOR GRAND LARCENY SUFFICIENT.

See CRIMINAL LAW, 12.

INHERITANCE TAX.

COMPUTATION OF STATE TAX.

See TAXATION, 28.

INJUNCTION.

TO RESTRAIN UNFAIR USE OF TRADE NAME.

See Good WILL, 3.

TO RESTRAIN OBSTRUCTION TO ENTRANCE.

1. Action to reform an informal written contract and to restrain defendant from obstructing the entrance to plaintiff's building from an alley. In consideration of plaintiff building a wall sufficient to support one side of defendant's building and allowing sewer and water pipes to pass through his lot to defendant's property, the latter agreed to give the use of ground in the rear of his building as a means of entrance and exit. Held: Permanent injunction against closing the opening into the alley at the property line justified by the evidence.

-Sharkey v. Batcher, 337.

PLEADING.

2. Where the franchise of defendant provided that in case of disagreement over the price of gas to be charged by defendant, when notified by plaintiff's city council so to do, defendant should select an arbitrator, the city council should select another, and the two chosen should select a third, and these arbitrators should fix the price of gas to be paid, and defendant claimed it could fix the price of gas to private consumers without consent of the city council or without arbitration, the omission of an averment in the complaint that defendant had not been notified by the city council to name an arbitrator, as prescribed in section 3 of the franchise, is not fatal, for it is evident that had notice been given it would have been ignored.

—City of Red Wing v. Wisconsin-Minnesota Light & Power Co. 245.

EFFECT OF INJUNCTION ON ORDER OF MINIMUM WAGE COMMISSION.

See MASTER AND SERVANT, 8.

INSOLVENCY. See APPEAL AND ERROR, 6; CORPORATION, 17.

INSURANCE.

CANCELATION-RETURN OF PREMIUM.

See INSURANCE, 4.

 In Minnesota, when a policy is canceled for a false representation preventing the attaching of the risk, the insured is entitled to a re-

INSURANCE—Continued.

turn of the premium, unless the representation was fraudulent, in which case he is not.

-Madden v. Interstate Business Men's Accident Assn. 8.

EVIDENCE.

- 2. Receiving the proofs of claim in evidence "for all the purposes for which they are properly admissible" was not error.
 - -McKay v. Minnesota Commercial Men's Assn. 192.

ACCIDENT INSURANCE.

3. A policy of accident insurance contained a provision authorized by section 3524, G. S. 1913, to the effect that the acceptance by the insurer of delinquent premiums should reinstate the policy, but only to cover accidental injuries thereafter sustained.

It is held that the provision is valid, and, as to insurance companies operating under the statute, operates as a modification of the rule applied in Mueller v. Grand Grove, 69 Minn. 236, 72 N. W. 48, and to exclude liability for injuries suffered by the insured when the policy is under suspension by reason of the default.

- -Ward v. Merchants Life & Casualty Co. 262.
- 4. A policy of accident insurance provided that the insurer might at any time cancel the policy upon a return of the unearned portion of the premium paid. In the application the insured made a false representation of a character giving the insurer a right of forfeiture. After an accident the insurer, with knowledge of the false representation, canceled the policy under the provision mentioned returning the premium unearned at that time. It is held that the facts stated evidence as a matter of law a waiver of forfeiture upon the ground of the misrepresentation in the application.
 - -Madden v. Interstate Business Men's Assn. 6.
- 5. Plaintiff, a traveling salesman, was injured in a railway collision. The fact that he continued his journey and two days later made another journey did not establish as a matter of law that his disability to follow his vocation was not total at the time of the accident, and instructions to that effect were properly refused. An instruction which was sufficiently covered by the general charge was also properly refused.
 - -McKay v. Minnesota Commercial Men's Assn. 192.

INSURANCE-Continued.

CASUALTY INSURANCE.

LIABILITY OF INSURER TO GARNISHMENT AFTER JUDGMENT AGAINST INSURED.

See GARNISHMENT.

6. As the policy required the casualty company to defend the action at its own expense and contained no provision requiring defendant to furnish a supersedeas bond in case of appeal and the company accepted and used a bond for costs, his failure to furnish a supersedeas bond did not release the company from liability.

-Powers v. Wilson, 309.

SAME-CONDITIONAL SETTLEMENT BY INSURED.

7. The verdict was for \$12,500; the policy for \$5,000. An appeal was taken to this court without giving bond to stay proceedings. Thereafter plaintiff entered judgment and issued an execution under which she seized all of defendant's property. Defendant then made an agreement for settlement conditioned upon the company paying the amount of the policy. The company refused to pay and continued the litigation to a final conclusion. Held, that making this conditional agreement did not release the company as its rights were not affected thereby.

-Powers v. Wilson, 309.

FIRE INSURANCE.

- 8. A fire insurance policy covered grain owned by the insured while contained in its elevators, warehouses, or sheds, "or while in cars on tracks within 100 feet thereof." Fire destroyed the elevator and grain in a railway car on a track within 100 feet thereof. This grain had been loaded by the insured for shipment and a bill of lading had been issued by the railway company. Insured was the consignee, as well as the consignor, and owned the grain in the car. It is held:
 - (1) The grain in the car was covered by the policy.
 - (2) There was no change in the interest or title of the subject of insurance, and no such change in the possession thereof as avoids the policy under the alienation clause.
 - -Dodge Elevator Co. v. Hartford Fire Insurance Co. 75.
- A policy contained this language: "If in case of loss the assured is liable therefor." Held: When grain is owned by the insured, there

INSURANCE-Continued.

is no sense in speaking of the assured being liable for its loss.

-Dodge Elevator Co. v. Hartford Fire Insurance Co. 77.

MUTUAL BENEFIT INSURANCE.

See BENEFIT ASSOCIATION, 1-3.

- 10. The practice and custom of defendant, an accident benefit insurance association, in permitting and receiving from its members the payment of dues and assessments after the due date thereof, held, following Mueller v. Grand Grove U. A. O. D. 69 Minn. 236, 72 N. W. 48, not only a waiver of the failure to pay within the time fixed by the laws of the order, but also a waiver of the by-laws declaring a forfeiture for the default and an estoppel to invoke the same in an action on the contract.
 - -Suits v. Order of United Commercial Travelers, 246.
- 11. The provisions of the laws of the association limiting its liability where a suspended member has been restored or reinstated to good standing to injuries thereafter suffered have no application where no suspension was declared, or where a suspension, occurring automatically by reason of the default, has been waived by the association.
 - -Suits v. Order of United Commercial Travelers. 246.

INTEREST. See BANK AND BANKING, 3, subd. 6.

ON PARTIAL PAYMENTS BY PURCHASER.

The interest rule in case of partial payments requires the application of a payment if it exceeds accrued interest first to the discharge thereof and then to a reduction of principal; and in the event that it is less than accrued interest the former principal continues as the basis for the computation of interest.

-Porten v. Peterson, 153.

INTERSTATE COMMERCE. See CARRIER, 3, 11.

COMMISSION GIVEN OBIGINAL JURISDICTION TO DETERMINE WHETHER FREIGHT

RATES ARE UNREASONABLE OR DISCRIMINATORY.

See COMMERCE, 1.

INTOXICATING LIQUOR.

NAME OF LIQUOR IMMATERIAL.

. See CRIMINAL LAW, 17.

LICENSE TO SELL.

Under Minnesota liquor statutes it is settled that a license is required -only of retailers, that the quantity of five gallons is the determining quantity, and those who sell in that or greater quantities are not required to procure a license. Unless a particular statute forbids, they may be unlicensed sellers without offense. This has been the practical construction of the statutes from the beginning.

-State v. Northern Pacific Railway Co. 336.

KEEPING UNLICENSED DRINKING PLACE.

See CRIMINAL LAW, 20.

CONVICTION FOR ILLEGAL SALE.

See CRIMINAL LAW, 14, 16, 19.

JOINT RATE ACT. See CABRIEB, 1.

JUDGMENT.

PUBSUANT TO STIPULATION INVALID, WHEN.

- A judgment against a municipality, not rendered as the judicial act
 of a court, but entered pursuant to a stipulation of the officers of
 the municipality, is void if such officers lacked power to bind the
 municipality.
 - —City of St. Paul v. Chicago, St. Paul, Minneapolis & Omaha Railway Co. 322.

PURSUANT TO STIPULATION ON QUESTION OF LAW INVALID.

- 2. A stipulation that no obligation rested upon defendants to repair the bridge over their tracks here in question stated a conclusion of law, and a judgment to that effect entered pursuant thereto, without the judicial action of a court, is not a bar to a subsequent action by the city to compel defendants to repair such bridge. The subject matter cannot be removed from the domain of the police power of the city by such a stipulation and judgment.
 - —City of St. Paul v. Chicago, St. Paul, Minneapolis & Omaha Railway Co. 322.

NO CHANGE OF TITLE IN ABATEMENT PROCEEDING UNTIL ENTRY OF DECREE TO THAT EFFECT.

See NUISANCE.

JUDGMENT-Continued.

FORM OF DECREE WHERE PURCHASER OF LAND IS NOT YET ENTITLED TO A

CONVEYANCE.

See Specific Performance, 2.

VACATING.

- 3. An answer setting up a good defense is a showing of "sufficient cause" within the meaning of G. S. 1913, § 7739, which enacts that, where the summons is not personally served, the defendant, upon proper application, "may be permitted to defend at any time within one year after judgment, on such terms as may be just." Such applications are granted as a matter of right and are not addressed to the discretion of the court, as are applications under section 7786. —Pedersen v. Newton. 25.
- 4. A patent to land was issued in 1872. The patentee, a nonresident of Minnesota who died in 1876, and his family never paid any taxes and the land was sold for taxes in 1881. The purchaser and his grantees have since paid the taxes. In an action to quiet title, service of summons was by publication and no copy was mailed or served on any defendant. Judgment was entered June 22, 1916. Some time after the entry one of the sons living at Los Angeles learned of the judgment and purchased the interest of the other heirs. In February, 1917, he made application to vacate the judgment and for leave to answer. His affidavit does not mention when he received notice. A majority of the court hold that the facts justify a finding of laches in making the application.

-Pedersen v. Newton, 24, 26,

VACATING DEFAULT TAKEN IN VIOLATION OF COURT RULE.

- 5. Where cases were taken up and disposed of ahead of their regular order, it was error to refuse to vacate a default entered because defendant was not in court when his cases were reached on the calendar for trial.
 - -First National Bank of Northfield v. Coon, 320.

UPON PLEADINGS NOT APPEALABLE.

See Workmen's Compensation Act. 9, 10.

WHERE JUDGMENT WILL NOT BE REVERSED ON APPEAL ALTHOUGH TECHNICALLY WRONG.

See APPEAL AND ERBOR, 19.

JUDGMENT-Continued.

WHERE JUDGMENT APPEALED FROM IS INDIVISIBLE AND THE INTERESTS OF THE PARTIES NOT SERVED WITH NOTICE OF APPEAL ARE IN CONFLICT WITH A MODIFICATION OF IT, THE APPEAL MUST BE DISMISSED UNLESS AFFIRMED OR MODIFIED AS TO ALL PARTIES.

See APPEAL AND ERBOR, 4.

REVIEW OF JUDGMENT BY CERTIORARI.

See Workmen's Compensation Act, 9, 10.

JUDGMENT NOTWITHSTANDING VERDICT.

See Appeal and Error, 1; Bank and Banking, 1; Railway, 8; Vendor and Purchaser, 5.

JURY.

IN PROSECUTION UNDER A MUNICIPAL ORDINANCE DEFENDANT IS NOT ENTITLED

TO A JURY TRIAL.

See CRIMINAL LAW, 10.

DRAWING OF JUBY PANEL.

The clerk of the district court drew the panels of the grand and petit jury, for the term of court at which defendant was indicted and tried, in the presence of the sheriff and a person who had been duly elected a justice of the peace, had taken the oath of office, had received from his predecessor the records and files pertaining to the office, and who had for a week performed all the duties of the office in both civil and criminal cases, but whose official bond had not been filed. It is held:

The person so present at the drawing of the jury panels was a de facto justice of the peace and his official act, in being the proper person to be present at such drawing, under section 9101, G. S. 1913, cannot be questioned by a motion to set aside the indictment or by a challenge to the petit jury panel.

-State v. Van Vleet, 144.

JUSTICE OF THE PEACE.

DRAWING OF JURY PANEL IN PRESENCE OF DE FACTO JUSTICE.

See JURY.

LACHES. See JUDGMENT, 4: VENDOR AND PURCHASER, 4.

LANDLORD AND TENANT.

RESCISSION OF LEASE.

- 1. Even if it be conceded that the jury might properly find from the evidence that the tenant was induced to execute the lease because of a fraudulent promise of the landlord that no restaurant would be permitted in the building, the tenant by paying rent after a restaurant was installed precluded herself from rescinding the lease, for with full knowledge of the alleged fraud she recognized the binding force of the contract.
 - -Arcade Investment Co. v. Hawley, 27.

EQUIPMENT OF UNSAFE BUILDING WITH FIRE ESCAPE.

See HEALTH.

FIRE ESCAPE.

- 2. Plaintiff leased two rooms on the third floor of its 4-story building to defendant. A restaurant was afterwards established on the same floor. Action for rent. One defense was that the building was not equipped for fires according to law. Held: There was no violation of a penal statute by the lessor shown whereby the lease could be avoided. A restaurant which occupies rooms on the third story of an office building is not within the purview of G. S. 1913, § 5120, which enacts that every restaurant, occupied and used as such, which is more than three stories high, shall be equipped with fire escapes.
 - -Arcade Investment Co. v. Hawley, 27, 29.

TENANT HOLDING OVER LIABLE FOR RENT.

- 3. Where at the end of the term a lessor takes possession of a part of the leased premises not then occupied by the lessee, but the lessee retains possession of the remainder and refuses to vacate, the lessor may treat him as holding over under the lease as to the part retained by him, and may collect a proportionate part of the rental for the term during which he continues to occupy it.
 - -Harwood v. Meloney, 212,

COUNTERCLAIM FOR RENT.

See Cancelation of Instrument.

LAPSE OF MEMORY. See THEATRE, 2.

LARCENY. See CRIMINAL LAW, 12, 13; STATE, 1, 2.

LEGISLATURE. See Constitution, 1-3, 5; Master and Servant, 3, 4.

LETTER.

MAILING AND RECEIPT.

See Broker, 2.

It was stipulated that if the secretary of a local council of defendant were sworn as a witness, he would testify that he prepared the letter offered in evidence by defendant pursuant to the directions of the council and on a specified date, according to his best belief, inclosed copies thereof in envelopes properly addressed to all members of the council, including decedent, mailing the same with the postage duly paid for the usual transmission by mail; that each envelope was indorsed on the face thereof with return directions, and that the one mailed to decedent was never returned. That he would further testify he had no particular recollection of mailing this letter to decedent, but he believed he did because of his habit of mailing all letters and notices to each member. It was also stipulated that decedent was a methodical man, and his wife would testify that it was his practice to call her attention to his correspondence; that her attention was at no time called to a letter of this character, and that after his death the letter was not found among his papers, and plaintiff believed no such letter was ever received by him. Held: The trial court did not err in finding the letter was not mailed to or received by decedent.

-Suits v. Order of United Commercial Travelers, 246.

PRESUMPTION THAT PROPERLY MAILED LETTER WILL REACH THE PERSON TO WHOM ADDRESSED.

See EVIDENCE, 5.

OFFER AND ACCEPTANCE BY MAIL.

See CONTRACT, 2.

LIEN. See EVIDENCE, 14.

FOR PAYMENTS OF MONEY TO BROTHERS AND SISTERS OF GRANTEE IN CONVEYANCE
FROM PARENT.

See ADVERSE CLAIM: DEED, 2.

A recorded contract for the support of his parents between the parents and a son charged the land conveyed by them to him as the consideration for the contract with liens in favor of other children of the grantors for specified sums of money. The contract was subsequently rescinded and the land reconveyed to the parents. The annual payments to the parents would soon exceed the aggregate of the liens.

LIEN-Continued.

Held: The creation of the liens was a mere incident of the main transaction, there was no consideration moving from the other children, and the liens were not irrevocable.

-Emkee v. Ahston, 443, 446, 447.

LIGHTNING. See TRIAL, 4.

LIMITATION OF ACTION.

AGAINST ABUTTING OWNER IN POSSESSION OF PLATTED STREET.

See Adverse Possession.

MALICE. See MALICIOUS PROSECUTION.

MALICIOUS PROSECUTION.

MALICE - PROBABLE CAUSE - ADVICE OF COUNSEL,

- In an action for malicious prosecution plaintiff must prove malice, and want of probable cause for the prosecution.
 - -Jones v. Flaherty, 97.
- 2. If he makes a full and fair statement to a competent lawyer and is advised by the lawyer, upon such statement, that prosecution will lie, this is proof of probable cause. But if the statement is not full and fair, this defense collapses.
 - -Jones v. Flaherty, 97.

EVIDENCE.

- In this case the verdict of the jury is, in effect, a finding that defendant did not make such full and fair statement. The evidence sustains such a finding.
 - -Jones v. Flaherty, 97.

DAMAGES.

See DAMAGES, 3.

MANDAMUS. See School and School District, 1.

MASTER AND SERVANT. See Workmen's Compensation Act.

MINIMUM WAGE ACT.

- Chapter 547, Laws 1913, establishing a Minimum Wage Commission and providing for the determination and establishment of minimum wages for women and minors, is a valid exercise of the police power of the state.
 - -Williams v. Evans, 32.

- 2. There is a notion, quite general, that women in the trades are underpaid, that they are not paid so well as men are paid for the same service, and that in many cases the pay they receive for working during all the working hours of the day is not enough to meet the cost of reasonable living. Public investigations by publicly appointed commissioners have resulted in findings to the above effect. Starting with such facts, there is opinion, more or less widespread, that these conditions are dangerous to the morals and health of the workers and of future generations as well. In the economic strife between employer and employee to receive a just share of the profits from their joint effort, women as a class are not on an equality with men.
 - -Williams v. Evans, 40.
- 3. It is not necessary that the court should hold that statutes of this kind applicable to men would be valid. The court thinks it clear there is such an inequality or difference between men and women in the matter of ability to secure a just wage and in the consequence of an inadequate wage that the legislature may by law compensate for the difference. That there is such a difference has been recognized as an economic fact by the United States Supreme Court.
 - -Williams v. Evans, 40, 41.
- 4. It is not a question of what the court may think of the policy or the justification of such legislation. The question is: Is there any reasonable basis for legislative belief that the conditions mentioned exist, that legislation is necessary to remedy them, and that laws looking to that end promote the health, peace, morals, education or good order of the people, and are greatly and immediately necessary to the public welfare? If there is reasonable basis for such legislative belief, then the determination of the propriety of such legislation is a legislative problem to be solved by the exercise of legislative judgment and discretion.
 - -Williams v. Evans, 40.

SAME - CONSTRUCTION OF LIVING WAGE.

5. Section 12 of the 1913 Act (G. S. 1913, § 3915), directs every employer to pay a living wage as defined in the act and determined in an order of the commission. Held that this must be construed as establishing a living wage as defined in the act as the lawful minimum wage, and as fixing a living wage as so defined as the standard by which the Minimum Wage Commission must be guided

in determining a minimum wage for any occupation.

-Williams v. Evans, 42.

SAME - ORDER OF COMMISSION NOT VOID.

- 6. The order of the Minimum Wage Commission was not void for uncertainty because the period during which employees may be treated as "learners" and "apprentices" was not therein prescribed. If practical experience under the order renders necessary something more specific the order may be modified to meet the conditions disclosed. Until some action is taken by the commission or by statute, the matter will be subject to regulation by contract between employee and employer.
 - -Williams v. Evans, 45.
- The words "learners" and "apprentices" have a modern meaning reasonably well understood.
 - -Williams v. Evans, 45.

SAME - WHEN ORDER OF COMMISSION TAKES EFFECT.

- 8. The operation of the order of the commission was by statute postponed for 30 days from its date. Prior to the expiration of that time, an injunction was issued thereby further postponing the operation of the order. It will not go into effect until the injunction is dissolved on the remand of the cause to the court below.
 - -Williams v. Evans, 46.

INSPECTION OF SIMPLE TOOLS.

- The rule that no duty rests upon an employer to inspect simple and common tools to discover defects which arise from the ordinary use of such instruments, followed.
 - —Kromer v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co. 424.
- 10. The rule applies to a steel wrench furnished by the master, which was in good condition when furnished to the employee, and which had been used by the plaintiff, a skilled machinist, in a roundhouse for over two years.
 - —Kromer v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co. 424.
- 11. The wrench being a simple tool, the servant using it is deemed to have assumed all the risk incident to its use.
 - —Kromer v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co. 427.

DEATH OF SERVANT.

- 12. In this action for wrongful death alleged to have been caused by defendant's negligent failure to give the customary warning before moving cars in a repair yard, it is held:
 - (1) The evidence affirmatively shows that the customary warning was given deceased by calling out in his presence that the cars between which he was caught were about to be moved.
 - (2) The testimony fails to show that defendant omitted to ring the bell on the locomotive at the time the cars were moved. The positive direct testimony of witnesses to the fact that the bell was ringing was not overcome, nor made a question for the jury by the equivocal impeachment of one or two witnesses, nor by the testimony of others who were absorbed in their work, and who could only testify that they were not conscious of its ringing, and could not say whether it did or not.
 - -Plachetko v. Chicago, Burlington & Quincy Railroad Co. 278.

ASSUMPTION OF RISK.

See MASTER AND SERVANT, 11.

SAME -- PROMISE OF MASTER TO FURNISH GUARD.

- 13. The evidence sustains a finding of the jury that the plaintiff remained in the employment of the defendant, appreciating the risk of working about an unguarded lubricating glass, in reliance upon a promise that it should be guarded, and under such circumstances as to transfer the risk.
 - -Smith v. Great Northern Railway Co. 343.

ACTION UNDER FEDERAL EMPLOYER'S LIABILITY ACT.

14. Action for wrongful death of plaintiff's intestate. Member of a night switching crew in defendant's switchyard at Council Bluffs, in the course of his work, in stepping upon the foot-board across the end of a switch engine slipped, fell and was killed. Evidence that a "double handful" of coal, in size from dust to pieces the size of a walnut, were on the footboard, and sufficient to justify the jury in finding the coal came there as a result of coaling the engine a short time before. The evidence held sufficient to sustain the charge of negligence made the basis of the action, and to establish with sufficient certainty the fact that the death complained of was caused

thereby; the evidence takes that question beyond the field of conjecture and speculation.

-Castle v. Union Pacific Railroad Co. 396.

SAME - DAMAGES.

15. In actions under Federal Employer's Liability Act the rule of damages is the same as in the Federal courts in like cases, and permits a recovery of compensatory damages only, based upon the pecuniary loss of the next of kin. The next of kin are the widow and children of 4, 6 and 10 years. Verdict for \$20,000. Held excessive, and a new trial ordered unless plaintiff accepted a reduction to \$16.000.

-Castle v. Union Pacific Railroad Co. 401.

CONTRIBUTORY NEGLIGENCE.

16. Action by brakeman's mother against his employer to recover for the care and loss of earnings of the son, occasioned by personal injuries to him. The baggage from a passenger train going west was unloaded upon trucks which were left standing within a few inches of the edge of the station platform. After the train passed, the engine of a freight train which was standing on the track next the platform ran down on the passing track, came back and was coupled by the head brakeman to the caboose of its train. He then walked east and as the engine backed down with several freight cars he took hold of one of the grab irons on the side of the car, and with his feet in the stirrup and his face turned to the east, he rode on the car until he came in contact with the baggage truck and was brushed off and severely injured. Held: Whether he was negligent was a question for the jury.

-Nelson v. Chicago, Milwaukee & St. Paul Railway Co. 52.

MECHANIC'S LIEN.

APPOINTMENT OF RECEIVER TO HANDLE SUBJECT PREMISES.

In an action to foreclose a mechanic's lien, a receiver may be appointed, under G. S. 1913, § 7034, to take possession of, lease, or otherwise handle the property, for the benefit of all the parties, under the direction of the court, upon a petition of one of the lien claimants, where a sale has been had and confirmation thereof denied, asking that a receiver be appointed "to sell and dispose of" such property, and "to take charge and handle" the same under the direction of the court.

—Dezurik v. Iblings, 480.

MINIMUM WAGE ACT. See Constitution, 1, 4, 7; Master and Servant, 1-8. MONEY RECEIVED.

CORPORATION CAN BE HELD UPON AN IMPLIED PROMISE TO PAY.

See Corporation, 15.

MORTGAGE.

ERROR AS TO AMOUNT IN SALE CONTRACT.

See Specific Performance, 1.

NEGLIGENCE IN PAYMENT OF MORTGAGE.

See PRINCIPAL AND AGENT, 1.

MOTOR VEHICLE. See AUTOMOBILE.

MUNICIPAL CORPORATION.

ARBITRATION PROVISION IN GAS FRANCHISE.

See GAS, 1, 2.

 Where, in a franchise, the interests of the public are involved, doubts and ambiguities must be resolved in favor of that construction which is most advantageous to the public.

-City of Red Wing v. Wisconsin-Minnesota Light & Power Co. 244.

ORDINANCE PROHIBITING SALE OF EXPLOSIVES CONSTRUED.

See Explosive.

PUBLIC IMPROVEMENT.

APPEAL FROM DECISION OF LOCAL BOARD.

See HIGHWAY, 1-4.

POWER OF CITY TO FORCE RAILWAY COMPANY TO BUILD A BRIDGE.

See RAILWAY, 1.

CANNOT CONTRACT AWAY ITS POLICE POWER.

A city cannot divest itself of any part of its police power by contract, or otherwise.

—City of St. Paul v. Chicago, St. Paul, Minneapolis & Omaha Railway Co. 322, 326.

JUDGMENT PURSUANT TO STIPULATION OF MUNICIPAL OFFICERS VOID, WHEN.

See JUDGMENT, 1, 2.

MUNICIPAL CORPORATION—Continued.

STREET.

Adverse Possession of Platted Street by Abutting Owner.

See ADVERSE POSSESSION.

- 3. Decedent was on his bicycle, about 15 feet ahead of the automobile and between it and the curb, when he turned sharply to the left and was struck by the automobile. Evidence held to have justified the trial court in submitting the question of decedent's contributory negligence to the jury, and the evidence sustains the verdict in favor of defendant. There was no testimony of wilful or wanton negligence on the part of defendant.
 - -Kelly v. McKeown, 285.
- 4. Evidence ample to support the verdict that defendant city was negligent in leaving an excavation in the street for a water main unguarded at night, and that plaintiff was not negligent.
 - -Henrickson v. City of Benson, 511.

UNGUARDED EXCAVATION FOR SEWER UNDER CROSS-WALK.

5. A cross-walk on a street running east and west was built of stones about 5 feet long, over 2 feet wide and 7 inches thick. In digging a trench 5 or 6 feet deep for a sewer in the middle of the street, defendant removed one of the stones and placed it on the east side of the trench. The earth from the trench was thrown on the west side. Plaintiff on a very dark evening was crossing on the walk when he stumbled and fell over the stone into the trench. There were no guards or lights at this crossing and in order to follow the crosswalk he had to look ahead at the lights a block or two in the distance. In an action for damages against a city and its contractor, held, that the questions of negligence of defendants and contributory negligence of plaintiff were for the jury, and the court erred in directing a verdict for defendants.

-Williams v. Arthur A. Dobson Co. 228.

NAME.

OF PARTNERSHIP IS AN ASSET AND PASSES WITH THE SALE OF THE BUSINESS.

See Good Will, 1.

NEGLIGENCE. See Death by Wrongful Act, 1; Highway, 6, 7; Municipal Corporation, 4, 5; Trial, 3.

NOT NEGLIGENCE AS A MATTER OF LAW TO ENTER A DARK STAIRWAY.

See TRIAL, 1.

NEGLIGENCE-Continued.

OF BANK IN PAYMENT OF CERTIFICATES OF DEPOSIT.

See BANK AND BANKING, 3.

MEASURE OF CARE REQUIRED OF ELECTRIC LIGHT AND POWER COMPANY.

See Electricity, 1.

OF ELECTRIC LIGHT AND POWER COMPANY IN FAILING TO LOCATE BREAK IN ITS

TRANSMISSION WIRES.

See Electricity, 2.

OF PARENTS OF YOUNG CHILDREN.

See Electricity, 3.

SALE OF DANGEROUS ARTICLES TO YOUNG CHILDREN-DEALER LIABLE.

The law requires of him who deals in articles inherently dangerous in the use for which they are intended to refrain from placing the same in the hands of children of tender years, and, where such sales are made and injury results, the seller is answerable for the consequences naturally and proximately resulting therefrom.

-Schmidt v. Capital Candy Co. 378.

CONTRIBUTORY NEGLIGENCE.

See MASTER AND SERVANT, 16; MUNICIPAL CORPORATION, 3-5; RAILWAY, 2-5.

SAME-EVIDENCE.

See TRIAL, 2.

WILFUL NEGLIGENCE.

See MUNICIPAL CORPORATION, 3.

PROOF OF NEGLIGENCE.

See RAILWAY, 6-8.

NEWSPAPER. See TAXATION, 24.

NEW TRIAL. See APPEAL AND ERBOR, 21; MASTER AND SERVANT, 15.

NOTICE OF MOTION.

ERRORS AT THE TRIAL NOT EXCEPTED TO NOT REVIEWABLE ON APPEAL UNLESS
- SPECIFIED IN NOTICE OF MOTION.

See APPEAL AND ERROR, 3.

BECAUSE OF NEWLY DISCOVERED EVIDENCE.

See HIGHWAY, 5.

NEW TRIAL-Continued.

Action for the price of goods sold. Verdict for defendant. The trial court granted a new trial solely on the ground of error in the charge to the jury. Held: In limiting the ground for a new trial to errors in law, the trial court in effect approved the verdict. The claim of accident or surprise was addressed to the discretion of the court, and it would not have been error to refuse a new trial on that ground. As the charge was entirely free from criticism and the evidence supported the verdict, the order appealed from was reversed.

-Faley v. Learn, 512.

APPEAL FROM ORDER DENYING MOTION FOR JUDGMENT NON OBSTANTE AND
GRANTING MOTION FOR NEW TRIAL WITHOUT STATING FOR
WHAT REASON, DISMISSED.

See APPEAL AND ERROR, 1.

PROCEEDINGS AT FIRST TRIAL NOT REVIEWABLE ON APPEAL FROM JUDGMENT
AFTER A SECOND TRIAL.

See APPEAL AND ERROB. 11.

WHETHER DISTRICT COURT CAN REQUIRE PAYMENT OF COSTS ON APPEAL WHEN
CASE IS REMANDED FOR NEW TRIAL.

See Costs, 2, 3.

NOTICE.

TO PURCHASER OF STOLEN STATE WARRANT.

See STATE, 1, 3.

TO BANK OFFICER OF FRAUDULENT DEPOSITS.

See BANK AND BANKING, 2.

To Corporation of Knowledge of Directors as Individuals.

See Corporation, 14.

OF WITHDRAWAL OF SURETY NECESSARY TO HOLD CO-SURETY ON CONTINUING GUARANTY.

See GUARANTY, 4.

OF DEFAULT OF PRINCIPAL NECESSARY TO HOLD SURETY.

See PRINCIPAL AND SUBETY, 2.

OF EXPIRATION OF TIME TO REDEEM FROM TAX SALE.

See TAXATION, 21-26.

NOTICE-Continued.

OMISSION TO SERVE NECESSARY PARTIES WITH NOTICE OF APPEAL.

See APPEAL AND ERROR, 4, 6-9.

NUISANCE.

WHEN ABATEMENT PROCEEDING AFFECTS TITLE TO PROPERTY SEIZED.

An abatement proceeding does not eliminate the title of a defendant to the property seized therein until the entry of a decree to that effect, and it is not unlawful for a defendant to contract with reference to such property prior to the decree.

-Abernethy v. Halk, 253.

OFFICER.

DEFALCATION OF STATE TREASURER.

See STATE, 1, 2.

DISCLOSURE BY PUBLIC OFFICER.

See EVIDENCE, 9.

DISCLOSURE OF TAXPAYERS' LISTS.

See EVIDENCE, 10, 11.

DRAWING OF JURY PANEL IN PRESENCE OF DE FACTO OFFICER.

See JURY.

PARENT AND CHILD.

See SEDUCTION, 1.

WHETHER FATHER OR SON WAS OWNER OF AUTOMOBILE.

See HIGHWAY, 6.

CONVEYANCE TO CHILD UPON CONTRACT FOR SUPPORT OF PARENT.

See DEED, 2.

RESCISSION OF CONTRACT FOR SUPPORT OF PARENTS.

See LIEN.

NEGLIGENCE OF PARENTS.

See DEATH BY WRONGFUL ACT, 1.

PARK. See Eminent Domain, 1-3.

PARTIES TO ACTION. See ABATEMENT AND REVIVAL; APPEAL AND ERBOB, 4, 6-9; VENUE, 3.

ACTION AGAINST DEFENDANT IN A DIFFERENT CAPACITY.

See Action, 2.

PARTITION. See ESTOPPEL, 1.

PARTNERSHIP.

NAME OF PARTNERSHIP AN ASSET AND PASSES WITH THE SALE OF THE BUSINESS.

See Good WILL, 1.

SEPARATE CONVEYANCES BY INDIVIDUAL PARTNERS HAVE SAME EFFECT AS SINGLE CONVEYANCE IN THE NAME OF THE FIRM.

See Good WILL, 2.

PAYMENT.

INTEREST RULE IN CASE OF PARTIAL PAYMENT.

See Interest.

OF CERTIFICATES OF DEPOSIT TO ONE AGENT OF DEPOSITOR WITHOUT CONSENT OF THE OTHER

See BANK AND BANKING, 3, subd. 2.

PAYMENT INTO COURT. See TAXATION, 27.

PENSION. See BENEFIT ASSOCIATION, 1.

PHYSICIAN AND SURGEON. See Evidence, 15.

PLAT.

Adverse Possession of Platted Street by Abutting Owner.

See Adverse Possession.

PLEADING.

COMPLAINT.

See Benefit Association, 2; Injunction, 2; Sale, 6; State, 3.

SAME-QUANTUM MERUIT.

See Work and Labor, 2.

ANSWER.

See VENUE, 2.

AMENDMENT OF COMPLAINT IN RESPECT TO DEFENDANT.

See ACTION. 2.

AMENDMENT OF ANSWER.

See APPEAL AND ERBOR, 16.

AMENDMENT OF ANSWER DURING TRIAL.

See APPEAL AND ERBOR, 16.

PLEADING-Continued.

SUPPLEMENTAL ANSWER.

Whether the filing of a supplemental answer shall be permitted at the trial is discretionary with the trial court.

-McKay v. Minnesota Commercial Men's Assn. 192.

DEMURRER.

See VENUE, 2.

DEPARTURE.

See WORK AND LABOR, 2.

POLICE POWER. See CONSTITUTION, 5; JUDGMENT, 2; MASTER AND SERVANT, 1; MUNICIPAL CORPORATION, 2; RAILWAY, 1.

POSSESSION.

SERVICE OF NOTICE OF EXPIBATION OF TIME TO REDEEM FROM TAX SALE UPON
PERSON IN POSSESSION.

See TAXATION, 22, 23.

PRINCIPAL AND AGENT. See BANK AND BANKING, 3; CORPORATION, 7, 12.

NEGLIGENCE OF AGENT.

- Evidence examined, and held sufficient to sustain the verdict of a
 jury to the effect that the defendant, in transacting business for
 plaintiff as his agent, was negligent in remitting funds in his hands
 for the payment and discharge of a real estate mortgage to a party
 other than the owner of the mortgage.
 - -Erickson v. Reine, 282.
- 2. Where to accommodate a bank a promissory note signed by third persons was made payable to defendant, and when he discovered that fact he refused to deliver it to the cashier of the bank until the latter furnished him a memorandum agreeing to reimburse him if he had to pay the note, the giving of the memorandum was as much a bank act as the taking of the note.
 - -State Bank of Willow River v. Pangerl, 20, 21.

PRINCIPAL AND SURETY. See GUARANTY. 3; INSURANCE, 6.

LIABILITY OF SURETY ON BOND OF STATE TREASURER.
See State, 1-3.

CHANGE IN BOND NOT RETROACTIVE IN EFFECT.

 A bond given by a dealer in live stock was conditioned that he should pay for each lot of stock purchased within 48 hours after delivery.

PRINCIPAL AND SURETY-Continued.

After the bond had been for some time in force the obligee requested and defendant consented that it be changed to provide for payment within two weeks after delivery. *Held*, this change was not retroactive and the bond did not secure money due from sales made during the two weeks' period prior to the change.

- -Hughes v. Globe Indemnity Co. 417.
- A provision in such a bond requiring notice within 12 hours after a
 default is valid. Where such notice is not given the surety is not
 liable.
 - -Hughes v. Globe Indemnity Co. 417.

DEFAULT OF PRINCIPAL.

- Proof that such a default existed at the time of any sale is matter of defense. Plaintiff need not in the first instance negative such a default.
 - -Hughes v. Globe Indemnity Co. 417.

DISCHARGE OF SURETY.

See GUARANTY, 4; INSURANCE, 6.

CONDITIONAL AGREEMENT FOR SETTLEMENT BY INSURED DID NOT RELEASE THE INSURER.

See Insurance, 7.

PROCESS.

ACTION BEGUN BY SERVICE OF SUMMONS.

See ACTION.

SERVICE OF SUMMONS BY PUBLICATION.

See Court, 2; Judgment, 4.

SERVICE IN TERRITORY OF MINNESOTA.

See VENUE, 2.

PUBLICATION.

DEFECTIVE AFFIDAVIT OF PUBLISHER OF NEWSPAPER.

See Taxation, 24.

RAILWAY. See STREET RAILWAY.

THROUGH TRAFFIC AGREEMENT BETWEEN TWO COMPANIES CREATES CONTIN-UOUS THROUGH LINE.

See CARRIER, 2, 4, 5.

RAILWAY-Continued.

CONSTRUCTION OF TARIFF.

See CARRIER, 6.

LOSS OF GRAIN FROM FIRE IN CAR ON ELEVATOR TRACK AFTER ISSUE OF BILL OF LADING.

See INSURANCE, 8.

GROSS EARNINGS TAX.

See TAXATION, 6-13, 15, 16.

CITY MAY FORCE COMPANY TO BUILD BRIDGE.

A city, in the exercise of its police power, may compel a railway company to construct and thereafter maintain a bridge for the purpose of carrying a street over its tracks, if a bridge is necessary to enable the public to cross such tracks safely and conveniently.

—City of St. Paul v. Chicago, St. Paul, Minneapolis & Omaha Railway Co. 322, 326.

ACTION FOR WRONGFUL DEATH.

See MASTER AND SERVANT, 12, 14.

ACTION UNDER FEDERAL EMPLOYER'S LIABILITY ACT.

See Master and Servant, 14, 15.

ACCIDENT AT HIGHWAY CROSSING-CONTRIBUTORY NEGLIGENCE OF TRAVELER.

- A traveler about to cross a railroad track who fails to use his senses to discover whether a train is approaching is chargeable with contributory negligence as a matter of law.
 - -Holm v. Great Northern Railway Co. 258.
- 3. The custom of flagging trains in a neighboring village to the one wherein the collision occurred, can have no bearing upon decedent's contributory negligence where no offer was made to show that it was ever the practice to flag trains at the latter place, or that he was not fully acquainted with the practice there obtaining.
 - -Knapp v. Northern Pacific Railway Co. 338.
- 4. Decedent was a vigorous young man in full possession of all his faculties. He kept a livery stable and was familiar with the locality. There were five railway tracks at the crossing, the most westerly being the main line or passenger track. Shortly before 1 p. m. on a bright August day decedent drove a span of horses attached to an open buggy upon the crossing from the east. At the main line track he was struck by the fast mail. There was evidence that

RAILWAY—Continued.

the station agent was at the crossing excitedly swinging his flag while decedent was driving toward him at a slow trot, looking downward and apparently paying no attention to his surroundings, until within 2 or 3 feet of the passenger track. *Held*:

Plaintiff's evidence shows affirmatively that the deceased must have seen the warning of the flagman, if he had looked, and was chargeable with contributory negligence for failing to do so.

- -Holm v. Great Northern Railway Co. 258.
- 5. Evidence that on a bright October afternoon decedent, who was familiar with the locality and the train service, drove a Ford automobile with a top but no side curtains, which was dragging a 20-foot telephone pole, the small end of which rested on the ground. His speed was estimated from 6 to 15 miles an hour. The last 100 feet to the railroad the view was unobstructed for more than 1,200 feet. There was the usual railroad signpost to the south of the crossing. On the signboard to the north there was an automatic gong or bell which was ringing. The crossing whistle was sounded and the locomotive bell was ringing. The train was 10 minutes late, running about 50 miles an hour. Decedent was 62 years old and there was no evidence of any impairment of sight or hearing. Held: He was guilty of contributory negligence.
 - -Knapp v. Northern Pacific Railway Co. 338.

WILFUL NEGLIGENCE.

- The evidence is insufficient to support a recovery on the theory of wanton injury, or wilful or wanton negligence.
 - -Knapp v. Northern Pacific Railway Co. 338.
- 7. The fireman who saw decedent when the locomotive was several hundred feet from the crossing was not guilty of wanton negligence in not causing the engineer to give the alarm whistle in time to prevent the collision. The fireman saw that the speed of the automobile was such that the car could be readily stopped and that by a side glance decedent could see the approaching train. One of plaintiff's witnesses, 35 feet distant from the place of collision, made no move to warn decedent because he expected the latter to stop in time. Held: The evidence is insufficient to support a recovery on the ground of wanton injury, or wilful or wanton negligence.
 - -Knapp v. Northern Pacific Railway Co. 338, 341, 342.
- A young man returning at 4 a. m. from a dance in Minnesota to his home in Wisconsin used defendant's single track bridges near North

RAILWAY-Continued.

La Grosse, over which 50 trains a day cross, and was struck by a locomotive and injured. Verdict for plaintiff. Appeal from order denying motion for judgment notwithstanding the verdict. Evidence examined, and held insufficient to show wilful negligence.

-Willett v. Chicago, Milwaukee & St. Paul Railway Co. 288.

PROSECUTION FOR KEEPING AN UNLICENSED DRINKING PLACE.

See CRIMINAL LAW, 20.

RECEIVER. See APPEAL AND ERROR, 6-9; EXECUTION.

APPOINTMENT OF RECEIVER.

See MECHANIC'S LIEN.

REFORMATION OF INSTRUMENT. See Injunction, 1.

RELEASE.

RESCISSION OF CONTRACT OF SETTLEMENT.

A contract of settlement of a cause of action procured by a misrepresentation of a material fact, though innocently made, may be rescinded by the one relying upon it, following Jacobson v. Chicago, M. & St. P. Ry. Co. 132 Minn. 181, 156 N. W. 251.

-Smith v. Great Northern Railway Co. 343.

REMOVAL OF ACTION.

PRIORITY OF JURISDICTION.

See COURT. 2.

REPLEVIN.

A carload of potatoes was sold by a wholesale concern to one Dusenberry, and the purchase price was furnished by one Rand. The delivery order was made out and delivered to Dusenberry in the presence of Rand. Two days later the seller delivered the bill of lading to a third man who was with Dusenberry and Rand at the time of sale. That same day Dusenberry sold the potatoes to plaintiff for less than they cost and delivered to him the order and bill of lading. When plaintiff called upon the railway company for the potatoes, delivery was refused. Action in replevin. Held: The true owner was estopped from questioning plaintiff's title.

-Olsen v. Great Northern Railway Co. 316.

RESTAURANT. See Landlord and Tenant, 1, 2.

SALE.

OF ARTICLES INHERENTLY DANGEROUS TO YOUNG CHILDREN.

See NEGLIGENCE.

TRUE OWNER OF TITLE WHO ALLOWS ANOTHER TO APPEAR AS OWNER ESTOPPED
FROM CLAIMING TITLE AGAINST AN INNOCENT PURCHASER.

See ESTOPPEL, 3: REPLEVIN.

CONSTRUCTION OF CONTRACT.

1. The evidence *held* to justify a finding by the jury that an adding machine was included within the general description of the property transferred by the contract involved in this action.

-Jordan v. Van Duzee, 104.

IMPLIED WARRANTY OF TITLE.

- There is an implied warranty of title applicable, in the absence of an express warranty, to all sales of personal property by the person in possession who assumes the right to sell it as his own.
 - -Jordan v. Van Duzee, 103.
- There is no waiver of a breach of such a warranty where the vendee, without coercion by judicial process, on demand surrenders the property to the holder of a title superior and paramount to that of his vendor.
 - -Jordan v. Van Duzee, 104.
- 4. The vendee may in such case determine the validity of an adverse claim in his own way, but has the burden of establishing the same when necessary to support an action against his vendor for a breach of the warranty of title.
 - -Jordan v. Van Duzee, 104.

AUTHORITY OF GENERAL MANAGER TO GIVE WARRANTY ON SALE OF SEED.

See Corporation, 12.

ORAL WARRANTY.

- 5. The evidence sustains a finding of the jury that in the course of negotiations with the plaintiffs the vice-president and general manager of the defendant corporation made an oral warranty of the germinating power of seed-wheat sold them; and the effect of such warranty was not as a matter of law annulled by printed disclaimers of warranty in the letter of confirmation, invoice and shipping tags, though the contract was oral and within the statute of frauds.
 - -Moorhead v. Minneapolis Seed Co. 11.

SALE-Continued.

IMPLIED WARRANTY.

- 6. A complaint alleged the sale and delivery to plaintiff of the property of an electric company, with a warranty of title; that an adding machine was included in and was a part of the property so sold, though it was not in fact the property of defendant, but belonged to the maker of it; that upon demand by the maker plaintiff surrendered the possession of the machine, to his damage in the sum of \$325, the alleged value thereof. Held: The facts so pleaded clearly show a right of action for the breach of defendant's warranty of title to the machine. As the action was in contract, not in tort, allegations of fraud and deceit were unnecessary. Though the complaint contained no allegations showing an express warranty of title, by representations to that effect, the case is controlled by the rule of implied warranty.
 - -Jordan v. Van Duzee, 105, 106.
- 7. Action for price of merchandise. Counterclaim for breach of implied warranty. Finding in favor of plaintiff. Held: The cause of shrinkage of the lumber was a question of fact for the trial court and the evidence will not warrant reversing the finding.
 - -Jefferson v. A. Guthrie Co. 496.

ACTION FOR BREACH OF WARRANTY - SETTLEMENT.

- 8. The buyer of a roofing preparation after using it a year wrote the seller that if the latter would send him two barrels he would call it "O. K." This quantity, of the value of \$100, was sent and plaintiff paid the amount of the original bill. Two years later plaintiff began this action for breach of warranty on the original purchase. Held: The facts show that plaintiff's claim for breach of warranty had been fully settled and satisfied.
 - -Dieudonne v. Arco Co. 441.

BREACH OF CONTRACT - RECOVERY OF LOST PROFIT.

- 9. In an action for breach of contract, profits which would have been realized had the contract been performed, and which had been prevented by its breach, may be recovered where such profits are not open to the objection of uncertainty of of remoteness, or where, from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into.
 - -Lewistown Iron Works v. Vulcan Process Co. 180.

SALE-Continued.

- 10. In an action for breach of contract, where the vendor sold to the vendee a certain welding apparatus for use in its machine repairing business, in a certain county, and, as a part of the contract of sale, agreed to protect the vendee for that county on all such machines sold to it, and not to place any others of the same make in the county, proof of the amount of welding work and the profits derived therefrom done by machines of the same make placed in the county by the vendor, or others liable upon such contract, may be shown and taken into consideration by the jury, in estimating the vendee's damages for the breach.
 - -Lewistown Iron Works v. Vulcan Process Co. 180.

QUESTION FOR JURY.

- Whether the defendant assumed liability for a breach of contract was for the jury, under the evidence.
 - -Lewistown Iron Works v. Vulcan Process Co. 180.

QUAERE.

- 12. Whether the evidence sustains a finding that there was a breach of warranty in respect of the germinating power of the seed is questioned but not decided.
 - -Moorhead v. Minneapolis Seed Co. 12.

DAMAGES FOR BREACH OF WARRANTY.

- 13. Where there is an entire failure of germination, and therefore no crop, the measure of damages for the breach of warranty of germination is the amount paid for the seed, plus the cost of planting, plus the value of the use of the land for the cropping season, less the value of its use for a proper purpose to which it might reasonably have been put upon the ascertainment of a failure of germination, and not the value of the crop which would have been raised if the seed had been true to warranty less the cost of planting and producing.
 - -Moorhead v. Minneapolis Seed Co. 12.
- 14. Where there is a partial crop, or a crop of a different variety than that promised by the warranty, the proper measure is the difference in value between the crop raised and the crop which would have been raised had the seed responded to the warranty.
 - -Moorhead v. Minneapolis Seed Co. 16.
- 15. The objection suggested that there was no fixed rental value of land is without substantial merit. There need be no market rental value.

SALE-Continued.

It is enough if the use value is determined and that may be found without the aid of a market value. Farmers and others qualified to testify may furnish proof of value. See Nelson v. Minneapolis & St. L. Ry. Co. 41 Minn. 131, 42 N. W. 788.

-Moorhead v. Minneapolis Seed Co. 17.

SCHOOL AND SCHOOL DISTRICT.

Issue of Bonds-Resolution of Expediency.

- 1. The issuance of bonds to construct a schoolhouse was voted at a meeting of a school district by a majority of the legal voters. No previous action had been taken by the officers of the district. In mandamus against the school board to compel such issuance it is held, construing G. S. 1913, §§ 1855, 1968, that the issuance of bonds must be initiated by the board and that a resolution declaring the expediency such as is contemplated by section 1855 must be passed before a vote of the district; and that without such prior resolution a vote at a school meeting to issue bonds is ineffective and does not under section 1855 nor under section 1968 authorize the board to issue bonds.
 - —State ex rel. v. Board of Education of Independent School District No. 16, 94.

CONSTRUCTION OF APPROPRIATION IN 1917 ACT.

- 2. Prior appropriations for school aid to public schools of certain specified standards appropriated stipulated amounts annually, with the provision that if the appropriation was insufficient to pay all demands in full, it should be distributed pro rata. Up to July 31, 1916, there was a deficit. In 1917 the legislature appropriated an amount available for the year ending July 31, 1917, and an amount available for the year ending July 31, 1918. Construing this statute in the light of its history and circumstances, and in connection with other legislation, it is held it appropriates money for use in payment of aid accruing during the specific years mentioned and does not authorize payment, out of the amount appropriated, of a deficit accruing prior to those years.
 - -Mushel v. Schulz, 234.

SEDUCTION.

PREVIOUS CHASTE CHARACTER.

 In an action by a father for damages for seduction of his daughter, it is proper of instruct the jury that, if the daughter had at some time in her life been unchaste, but at the time of the alleged seducINDEX 607

SEDUCTION—Continued.

tion she had reformed and had actually acquired the virtue of chastity, she was then a woman of previous chaste character. The evidence justified this instruction in this case.

- -Haeissig v. Decker, 422.
- Seduction presupposes chastity, but it would not do to hold that chastity once lost can never be regained.
 - -Haeissig v. Decker, 423.

DAMAGES NOT EXCESSIVE.

See DAMAGES, 5.

SET-OFF AND COUNTERCLAIM. See CANCELATION OF INSTRUMENT.
SPECIFIC PERFORMANCE. See Exchange of Property.

- 1. The plaintiff contracted to sell to the defendant and the defendant agreed to purchase real property for a consideration of \$10,000 and as a part of the consideration agreed to assume a mortgage of \$5,200 recited as then being on the property. There was then upon the property a mortgage of \$5,500 and it was the only mortgage. Conceding that the plaintiff under a proper allegation might show his ability to reduce the mortgage to \$5,200 and give good title at the time of the decree subject to a mortgage indebtedness of \$5,200, and upon a proper offer of proof or tender might have specific performance, he was not entitled to relief in the absence of an affirmative showing.
 - -Lindstrom v. Helk, 100.

PURCHASER'S EQUITABLE INTEREST - FORM OF DECREE.

2. The plaintiff as vendee and the defendant as vendor entered into an oral contract for the purchase and sale of real property. The plaintiff took possession and made such part performance that the contract was taken out of the statute of frauds. He had an equitable interest. Certain instalments of the purchase price were not due. The defendant could not be required to take them in advance of the due date. Therefore the plaintiff, though he had an equitable interest, could not call in the legal title. The defendant repudiated the contract, claimed that the plaintiff had no interest, and that he was the sole owner free of any claim of the plaintiff. In an action for specific performance, praying also general relief, in which the plaintiff necessarily failed for the reason stated, it is held that the court should enter judgment determining the rights of the plaintiff and the defendant in the property, that is, that it should determine and ad-

SPECIFIC PERFORMANCE-Continued.

judicate the equitable title of the plaintiff resting upon the defendant's legal title.

-Porten v. Peterson, 152.

STATE. See BOUNTY; EVIDENCE, 9, 10.

PRACTICAL CONSTRUCTION OF ADMINISTRATIVE OFFICERS OF STATE DOES NOT
PREVENT AD VALOREM TAXATION OF SECURITIES HELD BY
RAILWAY COMPANY.

See TAXATION, 16.

LIABILITY OF SURETY ON BOND OF STATE TREASURER.

1. The state treasurer caused to be abstracted from the office of the state auditor a warrant drawn by the auditor on the treasurer in favor of a school district for a loan and caused the indorsement of the treasurer of the school district to be forged thereon. He then sold and delivered the warrant to the plaintiff, assuming to represent the school treasurer, and received checks payable to himself. The plaintiff indorsed the warrant and deposited it in its bank, and the bank indorsed it and delivered it to another bank which received payment from the state treasury. Some months later the fraud and forgery and misappropriation were discovered, and the plaintiff, on pressure from state officials in which the official sureties of the treasurer participated, paid to the state what it received on the warrant with interest. In an action by the plaintiff to recover of the sureties it is held:

That the sureties were liable to the state for the treasurer's defalcation; that the plaintiff was liable to restore to the state the money of the state which it received on the stolen warrant though free of fault or negligence; that as between the sureties which contracted against the wrongful conduct of the treasurer in office, and the plaintiff purchasing the warrant in good faith and without notice or negligence and suffering from his official misconduct, the sureties should bear the loss; and that the plaintiff, having refunded to the state what it received, may recover of the sureties if it purchased the warrant in good faith and without notice or negligence.

- —Cooper, Myers & Co. v. Smith, 382.
- 2. That upon the facts stated and upon the issue between the plaintiff and the sureties the acts of misappropriation of the treasurer resulting in loss to the plaintiff and liability on its part to the state must be considered official, and as parts of one plan of misappropriation, and that, the plaintiff having paid to the state, the sureties



STATE-Continued.

cannot escape liability to reimburse it upon the theory that the acts of the treasurer in abstracting, forging, and negotiating the warrant, and all acts which preceded payment were personal and unofficial and separable from the final act of payment, and therefore that they are not liable to reimburse it, though liable to the state before the plaintiff paid, and though the payment by the plaintiff relieved them of such liability, and though the act of payment was what involved both the sureties and the plaintiff in liability to the state.

- -Cooper, Myers & Co. v. Smith, 382.
- 3. That in view of the facts recited and others stated in the opinion the complaint does not show that the plaintiff was without notice of defects in the warrant and free of negligence, though it contains an allegation that it purchased in due course and without notice.
 - -Cooper, Myers & Co. v. Smith, 383.

STATUTE. See DRAIN, 5.

DISTANCE TARIFF ACT.

See CARRIER, 1.

JOINT RATE ACT.

See CARRIER, 1.

SPECIAL ACT NOT AFFECTED BY LATER STATUTE.

 The general statutes of the state upon the subject of eminent domain and the proceedings thereunder, subsequently enacted, held not a modification nor an amendment of Sp. Laws 1889, c. 30, and such general statutes are inapplicable to proceedings had thereunder.

-Hobart v. City of Minneapolis, 368.

CONSTRUCTION.

2. In construing a statute, we may, in case of doubt, take into account the object or purpose of the act, the events leading up to it, the history of the passage of the act through the legislature and modifications made during its course.

-Mushel v. Schulz, 234.

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STIPULATION.

FOR SETTLEMENT OF LITIGATION.

See Corporation, 13; Estoppel, 2.

VALIDITY.

- 1. A stipulation as to a matter of law which affects public interests is not binding upon the courts.
 - —City of St. Paul v. Chicago, St. Paul, Minneapolis & Omaha Railway Co. 322.

MOTION TO VACATE BECAUSE OF IMPROVIDENCE.

2. Upon the showing made it cannot be held that the court below erred

STIPULATION-Continued.

when denying defendant's motion to vacate a stipulation for settlement of the causes of action on the ground that it was improvidently made.

-Dickinson v. Citizens Ice & Fuel Co. 201.

STREET RAILWAY.

TAXATION OF SUBURBAN ELECTRIC RAILWAY.

See TAXATION, 17.

As long as the court has the duty of determining at what point an electric line ceases to be a street railway and becomes a commercial railway, there is reason in making the point that at which the railway ceases to use city streets or public highways without compensation to abutting owners, and acquires its own right of way. This is a less arbitrary point than the city limits.

-State v. Minneapolis & St. Paul Suburban Railway Co. 408.

SUNDAY. See EVIDENCE, 2; TIME.

TAXATION.

OMISSION TO LIST CREDITS FOR TAXATION.

See APPEAL AND ERROR, 15; EVIDENCE, 3, 8.

DISCLOSURE OF TAX LIST BY TAX OFFICERS.

See EVIDENCE, 10, 11.

STATE TAX UPON STOCKHOLDERS IN NATIONAL BANK.

See BANK AND BANKING, 5.

- The state cannot tax a national bank upon its capital but may tax its shareholders upon their stock in the bank, and may require the bank to apply any earnings distributable to its shareholders in payment of such tax.
 - -State v. Security National Bank, 162.
- Sections 2018 and 2021, G. S. 1913, impose a tax upon the stock of the shareholders and not upon the property of the bank.
 - -State v. Security National Bank, 162.
- 3. Where a national bank sold and transferred all its property and assets before May 1, but retained the proceeds thereof until May 15 and distributed them to its shareholders on that date, the stock of the

shareholders represented their interest in such proceeds on May 1 and is taxable therefor.

- -State v. Security National Bank, 162.
- 4. Defendant bank went out of business, and in May distributed all its property and assets to its shareholders. In the following October an assessment was made upon the stock of the shareholders, and pursuant thereto the tax in controversy was levied. As defendant had no funds of its shareholders in its possession at any time after the tax was levied, it cannot be required to pay such tax.
 - -State v. Security National Bank, 162.
- 5. The term "levied" as used in our tax laws has different meanings in different parts of the laws. It sometimes refers to the legislative act of imposing the tax, and sometimes to the administrative act of making the assessment, and extending the tax upon the tax lists. General Statutes 1913, § 2021, which provides that before declaring any dividend, every bank shall deduct from its annual earnings such amount as may be necessary to pay any taxes levied upon the shares of stock, plainly refers to the administrative act, and the tax in question was not levied upon the shares of stock until it was entered upon the tax lists. The language cannot be construed to require the bank to withhold sufficient funds to pay whatever tax might be levied in the future.
 - -State v. Security National Bank, 173.

GROSS EARNINGS TAX OF RAILWAY.

- 6. Whether property is owned or operated as railway property within the sense of the gross earnings tax (G. S. 1913, § 2226), often involves a question of fact.
 - -State v. Northern Pacific Railway Co. 475.
- 7. Stocks and bonds of terminal companies used by defendant as part of its railway system are property owned and used for railway purposes within the meaning of the gross earnings statute.
 - -State v. Chicago, St. Paul, Minneapolis & Omaha Railway Co. 514.
- 8. Bonds of a milling company were taken in payment of freight when the milling company was embarrassed financially. The finding of the trial court that they had not been held an unreasonable time or

for such time as to separate them from the ordinary working capital of defendant company, is supported by the evidence.

- -State v. Chicago, St. Paul, Minneapolis & Omaha Railway Co. 514.
- In a proceeding to enforce personal property taxes against the defendant railway company it is held:
 - (1) That certain corporate stocks and bonds and other corporate indebtedness were owned and used by the company for railway purposes within the meaning of the gross earnings statute; and that a tax upon such property is paid in the gross earnings tax and an ad valorem tax cannot be imposed.
 - (2) That certain stock in a foreign corporation, and an indebtedness owing by a foreign corporation, owned by the defendant, a foreign corporation, having its traffic and operative offices in Minnesota, such stock and indebtedness not being used in Minnesota nor arising from a transaction had there, and held in another state where the defendant has a financial and business office, under the facts detailed in the opinion had no taxable situs in Minnesota.
 - -State v. Northern Pacific Railway Co. 473.
- 10. Ownership, jointly with the Great Northern Railway Company, of a majority of the stock of the Chicago, Burlington & Quincy Railroad Company, by which ownership the two roads exercise a joint control and through trains and traffic pass from the two roads to the large traffic centers on the Burlington route; ownership, jointly with the Great Northern, of the stock and bonds of the Spokane, Portland & Seattle Railroad Company, over which road the other two roads operate their trains; ownership, either jointly with the Great Northern or alone, of a controlling or substantial interest in the stock or bonds of several railroads which are operated as branches or feeders or as terminals of the system; ownership, jointly with the Union Pacific Railroad Company, of the bonds of a fruit storage warehouse in the Yakima Valley in Washington; where the securities were not acquired or held for investment, is properly ownership of railroad property and is not subject to an ad valorem tax.
- 11. In a proceeding to enforce personal property taxes against the de-

-State v. Northern Pacific Railway Co. 476, 477.

fendant railway company it is held:

(1) That certain securities sought to be subjected to an ad valorem tax were owned and used for railway purposes within the gross earn-

ings statute, that they paid a tax when the company paid its gross earnings tax, and that they were not subject to an ad valorem tax.

- (2) That certain other securities, such as stocks and bonds or other indebtedness of corporations, though legitimately acquired and advantageously held by the company in connection with its railway operations, were not owned or used for railway purposes within the meaning of the gross earnings statute, and were subject to an ad valorem tax.
- (3) The securities mentioned in the preceding paragraph have a taxable situs in Minnesota, under the laws of which the defendant is incorporated and in which it has its principal office and place of business and its principal operating and traffic offices, though it has a financial office in New York where it transacts some of its business and though it keeps the securities in New York.
 - -State v. Great Northern Railway Co. 469.
- 12. It is clear that stock in a townsite company, stock in a coal mine acquired in part to secure a supply of coal for the future and in part to get traffic for the road, a loan to a lumber company whose stock it acquired to insure a future supply of ties, bonds of a land company which owns quarries from which the road gets traffic, stock in an electric company having a power plant in the state of Washington acquired with a prospect that the plant will be developed and power used in the electrification of the road, bonds of a hotel company in Spokane, bonds of an irrigation district in Washington. bonds of a city in Washington and of the Wisconsin Central Railway Company taken in payment for land sold, bonds of a milling company which it took in payment of freight which the company was unable to pay at the time, but had held for many years, and property of the general character indicated, though acquired properly and in the exercise of good business judgment, are not owned for railway purposes within the principle of the Minnesota cases.
 - -State v. Great Northern Railway Co. 471.
- 13. In determining whether such items of property are railway or non-railway, substance and not form controls. Stock ownership does not give title to the corporate property but majority ownership gives control and ownership, or less may be effective. Minnesota statutes, and railway statutes generally, authorize the acquisition for railway purposes of stocks and bonds. An investment is not intended but a use for railway purposes. If the company had acquired another road or branch or feeder or terminal, or an undivided interest.

or a right to use, by direct purchase, it would satisfy the tax demands of the state when it paid its gross earnings. The situation is hardly different if we go to the substance of things. It is clearly not of consequence that the control is not several but joint, or even that it is not joint, if through the securities the company in a practical way adds a railway operation to its system.

-State v. Northern Pacific Railway Co. 476, 477.

SITUS OF RAILWAY PROPERTY FOR PURPOSE OF TAXATION.

See Taxation, 11, subd. 3.

- 14. Where the corporation sought to be taxed has its statutory domicile in one state, with which its connection is nominal, and definite physical locations and extensive business and industrial operations in others, and in another a business location where its policy is determined and its financial operations are conducted and its corporate acts usual to the state of its creation are executed, the question of taxable situs is particularly vexing.
 - -State v. Northern Pacific Railway Co. 478, 479.

EXEMPTION FROM TAXATION.

- 15. The exemption from taxation granted the Minneapolis & St. Cloud Railroad Company by Sp. Laws 1870, p. 308, c. 52, in consideration of the payment of a gross earnings tax is not more extensive in application than the gross earnings statute. G. S. 1913, § 2226.
 - -State v. Great Northern Railway Co. 472.

PRACTICAL CONSTRUCTION BY STATE OFFICERS.

- 16. Where the ownership of securities not subject to an ad valorem tax and of securities subject to such a tax have regularly been reported to the Railroad and Warehouse Commission, the fact that the taxable securities have never been assessed does not constitute a practical construction by the administrative officers of the state which prevents the taxation of such taxable property now, though not taxed heretofore.
 - -State v. Great Northern Railway Co. 469.

OF SUBURBAN ELECTRIC RAILWAY.

17. Defendant suburban railroad company operates certain lines of street and trolley railroad on the tracks of the Minneapolis street railway company along the city streets to Thirty-First street and

Hennepin avenue. From this point to the city limits, a distance of two miles, the lines are operated, not along the city streets, but on the private right of way of defendant. It is *held* that this right of way is not subject to an ad valorem tax; the lines not being a street railway after they leave the city streets, and defendant being subject to a tax on the gross earnings of the lines after they enter upon such private right of way.

-State v. Minneapolis & St. Paul Suburban Railway Co. 405.

ASSESSMENT OF REAL ESTATE-PRESUMPTION.

18. There is no presumption that lands assessed in 1902 and 1904 in the name of a particular person are so assessed in 1908 when notice of expiration is issued; nor does the fact that the property was assessed in the name of the record owner in 1902 and 1904, coupled with the fact that there was no change in record ownership until after 1908, afford a presumption that the assessment was the same in 1908; nor does the presumption that public officers perform their duties dispense with proof that the property was assessed in the name of the person to whom the auditor directed the notice; nor is the recital in tax receipts of the treasurer that the property was assessed in the name of a particular person proof of the fact.

-Deaver v. Napier, 219.

REFUND-No APPEAL FROM ALLOWANCE BY COUNTY BOARD.

- 19. An order of the board of county commissioners, granting a demand under Laws 1917, c. 418, for the refundment of taxes, is not the allowance of a claim against the county within G. S. 1913, § 674, providing for an appeal to the district court from the allowance or disallowance of a claim by the county commissioners. The pretended appeal was properly dismissed.
 - -Penney v. County of Hennepin, 148.

ENTRY OF SALE IN COPY JUDGMENT BOOK.

- 20. Section 2122, G. S. 1913, which requires the county auditor, upon making a tax sale, to set out in the copy judgment book what disposition was made at such sale of each parcel of land, does not require an entry in that book of the date of the sale.
 - -Gabro Land Co. v. Michaud, 22.

EXPIRATION OF TIME FOR REDEMPTION FROM SALE UNDER 1913 ACT.

21. The time for redemption from a tax sale made under Laws 1913,

- c. 543, does not expire until the service of a notice and the expiration of 60 days thereafter.
 - -Burbridge v. Warren, 346.
- 22. Under the evidence it appears that the occupancy of the premises was such as to require service of notice of the expiration of the time of redemption from a tax sale upon the occupant.
 - -Pomroy v. Beattie, 127.

NOTICE OF EXPIRATION OF REDEMPTION FROM SALE-SERVICE ON OCCUPANT.

- 23. Under section 2148, G. S. 1913, requiring service of notice of the expiration of the time of redemption from a tax sale of real property, if there was occupancy which would require notice to be served, if the one in possession was the owner, then service of the notice on the occupant would be necessary, though the one in possession was there without title.
 - -Pomroy v. Beattie, 127.

SAME—PUBLICATION OF NOTICE DEFECTIVE.

- 24. Plaintiff claims title to the land under a sale for taxes held under Laws 1913, c. 543. It is held: The notices of expiration of redemption were not served as required by law for the reason that the affidavit of the publisher of a newspaper in which service by publication was attempted to be had stated that it was "generally circulated in Ramsey county and elsewhere." This was not proof of a legal publication. Lovine v. Goodridge-Call Lumber Co., 130 Minn. 202, 153 N. W. 517, followed.
 - -Burbridge v. Warren, 346.

SAME-INDORSEMENT ON TAX CERTIFICATE.

- 25. The indorsement of the auditor on a tax certificate, required by G. S. 1913, § 2135, to the effect that the time for redemption has expired and that the land is unredeemed, is not proof that notice of expiration has been given.
 - -Deaver v. Napier, 219.
- 26. The prima facie effect as evidence given to tax certificates by G. S. 1913, § 2132, of title in fee in the grantee after the time for redemption has expired, does not prove the giving of the notice of expiration.
 - -Deaver v. Napier, 219.

ACTION TO DETERMINE ADVERSE CLAIM-PAYMENT INTO COURT.

27. Under G. S. 1913, § 8060, the fee owner may maintain an action to determine adverse claims against a tax title holder, without paying into court the amount paid at the tax sale and subsequent taxes, though if he had brought an action to cancel the tax certificate under G. S. 1913, §§ 2168-2170, he would be required to make such payment.

-Deaver v. Napier, 219.

COMPUTATION OF INHERITANCE TAX.

28. The Minnesota inheritance tax is to be computed upon the clear value of the beneficial interest in the property which passes from the decedent to the beneficiaries designated by the will or by the statute, and the Federal inheritance tax is to be deducted from the value of the estate in ascertaining such clear value.

-State ex rel. v. Probate Court of Hennepin County, 210.

TENDER.

OF CERTIFICATE OF STOCK.

See Corporation, 8.

THEATRE.

INJURY ON UNLIGHTED STATEWAY.

- In this action to recover damages for injuries received in a fall
 on a stairway in a theatre, it was alleged that the stairway was
 negligently constructed and left unlighted. There was no evidence
 that the fall was the result of any defect in the stairway. Whether
 it was left unlighted and thereby caused plaintiff to fall was made
 an issue for the jury.
 - -Barrett v. Van Duzee, 351.

LAPSE OF MEMORY.

The evidence warranted the submission of plaintiff's lapse of memory.
 Barrett v. Van Duzee, 351.

TIME. See CORPORATION. 8.

REASONABLE TIME ALLOWED CARRIER TO DETERMINE OWNERSHIP OF SHIPMENT.

See Carrier, 9.

Under the terms of the bond, no recovery can be had on account of a sale made while the dealer is in default more than 48 hours on

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TIME-Continued.

previous sales. If the 48-hour period ends on Sunday, that day is not to be counted. See G. S. 1913, §§ 6010, 9412, subd. 21.

-Hughes v. Globe Indemnity Co. 417.

TITLE. See NUISANCE.

PROOF OF TITLE BY ADVERSE POSSESSION.

See Adverse Possession.

TRADE MARK AND TRADE NAME.

RIGHT TO USE FIRM NAME PASSED WITH SALE OF PARTNERSHIP EFFECTS AND GOOD WILL AND DEFENDANTS MAY BE RESTRAINED FROM UNFAIR USE OF NAME.

See Good WILL, 3.

TRIAL. See APPEAL AND ERROR, 16.

EVIDENCE ALREADY RECEIVED WITHOUT OBJECTION NOT OPEN TO OBJECTION.

See APPEAL AND ERROR, 13.

REMARK OF JUDGE.

The court made no misstatement of a fact in the case, nor prejudiced
plaintiff by the observation that a person may, under some circumstances, go safely down a dark stairway, for it conveyed the
thought that plaintiff was not to be held guilty of negligence as
a matter of law by entering a dark place.

-Barrett v. Van Duzee, 352.

OFFER OF PROOF.

See EVIDENCE, 6.

RULING OF COURT.

QUESTION OF ADMISSIBILITY OF EVIDENCE NOT PRESENTED BY APPEAL WHEN NO FINAL RULING ON OBJECTION TAKEN IN TRIAL COURT.

See APPEAL AND ERROR, 2.

NOT MATERIAL FOR JURY TO KNOW WHICH PARTY SUBPORNARD WITNESS.

See Evidence, 7.

WITHDRAWAL OF ISSUE FROM JURY.

See APPEAL AND ERROR, 14.

TRIAL-Continued.

QUESTION FOR JURY.

- See Bank and Banking, 1, 2; Conspibacy; Contract, 2; Guaranty, 1; Highway, 2, 3; Master and Servant, 16; Municipal Corporation, 3, 5; Sale, 11; Theatre, 1; Vendor and Purchaser, 6; Work and Labor, 1.
 - 2. Action for personal injury. Defense that the injury was caused by plaintiff's want of care. Defendant offered no direct proof of such negligence or want of care. But if the evidence of plaintiff in proving her case, together with other facts established, warranted the jury in reaching the conclusion that her want of care contributed to the accident, the court was right in submitting the defense pleaded.

-Barrett v. Van Duzee, 353.

COURT MAY REQUIRE DISCLOSURE OF TAXPAYERS' LISTS WHEN MATERIAL TO ISSUE ON TRIAL

See EVIDENCE, 10, 11.

CHARGE TO JURY.

See CONTRACT. 2: SEDUCTION. 2.

- 3. Where, during the trial, there was no controversy over the question of defendant's negligence, and in its charge the court instructed the jury, in effect, that there was no dispute but that defendant was negligent, and that defendant admitted that it was negligent, if defendant had any objection to the instruction as given, it should have called the court's attention to the particular part of the charge complained of. Not having done so, the error was waived.

 —Nelson v. Chicago, Milwaukee & St. Paul Railway Co. 52.
- Action for death of child from contact with live wire. Held: There was no error in not charging that the break was caused by lightning.
 —Drimel v. Union Power Co. 123.
- There was no reversible error in the charge to the jury when considered in its entirety, nor was it error to deny the defendant's requests to charge.
 - -Lewistown Iron Works v. Vulcan Process Co. 181.

REFUSAL TO GIVE REQUEST TO JURY.

See DEATH BY WRONGFUL ACT, 2; INSURANCE, 5; TRIAL, 5.

6. There can be no error in refusing to give a request where the evidence

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TRIAL-Continued.

is insufficient to support a finding upon the issue to which the request relates.

- -Knapp v. Northern Pacific Railway Co. 338.
- The general charge embodied the substance of the one requested by the defendant as to when it received actual notice of the break, and there was no error in its refusal.
 - -Drimel v. Union Power Co. 123.

SUBMISSION FOR FINDINGS.

8. At the close of testimony, defendant withdrew a counterclaim and moved that findings be made on the merits. Held: This was irregular, and was the equivalent of resting. This was a submission of the case. Therefore it was proper to make findings on the merits.
—Lindstrom v. Helk. 101. 103.

IMMATERIAL FINDING DISREGARDED.

- A finding which has no bearing on the conclusions of law may be disregarded.
 - -Stoering v. Swanson, 115.

FINDING SUFFICIENTLY DEFINITE.

- 10. The determinative finding as to the original construction of the ditch by the united efforts of the several landowners interested is definite enough to support the decision.
 - -Stoering v. Swanson, 115.

JUDGE'S ORAL STATEMENT OF EVIDENCE IN CRIMINAL PROSECUTION NOT FINDINGS.

See CRIMINAL LAW. 6.

ON CONFLICTING EVIDENCE SUPREME COURT WILL NOT MAKE NOR DIRECT FIND-INGS TO BE MADE.

See APPEAL AND ERBOR, 18.

TRUST. See Corporation, 5.

VENDOR AND PURCHASER.

- When a person who decides to buy is not where he can again make an
 investigation as to matters appearing important to him, it is not
 unreasonable that he should have the right to rely upon statements
 of the owner and seller made in reply to his inquiries.
 - -Nelson v. Berkner, 304.

PROMISES AT VARIANCE WITH WRITTEN CONTRACT.

2. If a promise is based upon false representations in respect to existing

VENDOR AND PURCHASER—Continued.

facts, made in connection with the promise, it affords a ground for rescinding the contract induced thereby.

- -Nelson v. Berkner, 302.
- 3. Fraudulent promissory representations made with no intention of keeping them are not grounds for rescission when the written contract, to the promisee's knowledge, reveals the falsity of the promise; for he cannot then be said to have relied thereon in entering the contract.
 - -Nelson v. Berkner, 301.

DEFAULT IN PAYMENTS WAIVED.

- 4. The default of the plaintiff in making payments when due did not bar him of his equitable interest in the absence of laches or abandonment, or of forfeiture by the affirmative action of the defendant, and under the evidence none of these was present; and strict payment was waived.
 - -Porten v. Peterson, 153.

ACTION TO RECOVER MONEY PAID BY PURCHASER.

5. In this action to recover what was paid on a land purchase contract, alleged to have been induced by the alleged false and fraudulent representations of the defendant, the court rightly denied the motion for judgment in defendant's favor notwithstanding the verdict.
—Nelson v. Berkner, 301.

MISREPRESENTATIONS-QUESTIONS FOR JURY.

- Misrepresentation of acreage of the cultivated portion as well as the distance to the schoolhouse were for the jury, notwithstanding the fact that plaintiff had seen the farm.
 - -Nelson v. Berkner, 301.
- 7. No assignment of error reaches the misrepresentation that the farm was as good as any in the county, and upon that issue it was not error to receive evidence as to the character of the subsoil and market value of the farm.
 - -Nelson v. Berkner, 301.

PART PERFORMANCE TO TAKE CONTRACT OUT OF STATUTE OF FRAUDS.

See Frauds (Statute of) 2; Specific Performance, 2.

VENUE.

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ACTION ON BOND OF PUBLIC CONTRACTOR TRANSITORY.

- Actions upon the bonds of public contractors are not made local under the provisions of sections 8245-8249, G. S. 1913.
 - -State ex rel. v. Tryholm, 389.

CHANGE OF VENUE.

- 2. Action in 1855 on a promissory note. Answer set up that neither of defendants resided in the county in which the action was brought or had property in that county subject to attachment, while one of the defendants resided in another county. Plaintiffs demurred to the answer and appealed from an order overruling their demurrer. Held:
 - (1) Process may be served by the proper officer anywhere in the territory of Minnesota and after answer to the merits the court has jurisdiction both of the subject matter and of the parties.
 - (2) The place of trial selected by plaintiff is indicated by the venue of the complaint, but the court may change the place of trial on the application of all the defendants who answer. R. S. 1851, p. 334, § 43. The primary object of this statute was to protect defendants against the oppression of plaintiffs. But that purpose will not justify construing the clause in section 41, "the action must be tried in the county in which the parties" reside, as an absolute and inflexible mandate so as to take away from the court jurisdiction to change the place of trial when it has jurisdiction of the subject matter and of the parties.
 - (3) Under this section 43 the answer confers upon the court jurisdiction over the place of trial of the action, but to obtain such change the defendants who answer must make application to the court by motion for an order changing the place of trial.
 - -Merrill, Cowles & Co. v. S. W. Shaw & Brother, 1.

SAME-JOINDER WITH FOREIGN CORPORATION.

- 3. In actions not made local by the provisions of sections 7715-7720, G. S. 1913, a resident defendant is not deprived of the right to have the place of trial changed to the county of his residence by joining a foreign corporation as a party defendant.
 - -State ex rel. v. Tryholm, 389.

WAIVER. See Insurance, 10, 11; Trial, 3; Vendor and Purchaser, 4.

WAREHOUSEMAN. See CARRIER, 8.

WARRANTY. See Corporation, 12.

WARRANTY-Continued.

OF TITLE.

See SALE, 2-4, 6,

OF GERMINATING POWER OF SEED-WHEAT.

See SALE, 5.

MEASURE OF DAMAGES FOR BREACH.

See SALE, 13, 14.

WILL.

On a second appeal, the evidence sustained findings that testatrix had mental capacity to make her will and was not unduly influenced.

—Hetherington v. Bush, 501.

WITNESS. See EVIDENCE, 7.

SWEARING WITNESS TESTIFYING IN COUNTY DITCH PROCEEDING BEFORE COUNTY BOARD.

See DRAIN, 4, 5.

CONVERSATION IN PRESENCE OF DECEDENT.

1. The widow of the deceased was not precluded from testifying by G. S. 1913, § 8375, subd. 1, which provides that a wife shall not be examined for or against her husband without his consent; nor was she prevented by G. S. 1913, § 8378, which provides that a party to an action or one interested in the event of it shall not testify to a conversation or admission of the deceased, from testifying to a conversation between the plaintiff and herself in the presence of the deceased who did not participate therein, but to make error in the exclusion of such testimony available it was necessary that the plaintiff make an offer of proof showing its materiality.

-Thaden v. Bagan, 46.

CREDIBILITY.

How long the witness' husband had been engaged in the real estate business could be of no possible aid in determining any issue involved, and could not bear upon the credibility of the witness.

-Barrett v. Van Duzee, 351.

SAME-IMPEACHMENT FOR BIAS.

3. Evidence tending to show a disposition on the part of a witness to withhold the truth by concealing facts is admissible for the pur-

WITNESS-Continued.

pose of showing bias and impugning the credibility of the witness, and the court did not abuse its discretion as to the admission of such testimony.

-State v. Kampert, 138.

CROSS-EXAMINATION.

See CRIMINAL LAW, 13.

REDIRECT EXAMINATION.

4. As a rule it is not permissible by redirect examination of a witness to bring out the fact that he has repeated the story told on the witness stand for the purpose of counteracting the admission of a prior contradictory statement, made in his cross-examination. Plaintiff did not bring the witness within the exception pointed out in State v. La Bar, 131 Minn. 432, 155 N. W. 211.

-Barrett v. Van Duzee, 351.

WOLF BOUNTY.

PAYMENT BY COUNTY.

See BOUNTY, 1-3.

WORDS AND PHRASES.

WHEN LAND IS "ADJACENT" TO THE CITY.

See EMINENT DOMAIN, 2.

- 1. Where the legislature appropriated a sum of money for a specified purpose "available" for a specified fiscal year, it intended an appropriation for the current expenses of that year or to defray the obligations of that year. It did not intend the money so appropriated to be used for obligations accruing during prior fiscal years.
 —Mushel v. Schulz. 237.
- 2. The word "corporation" in section 4 of the franchise of defendant evidently refers to the citizens of Red Wing. The same meaning should be given to the word in the last sentence of the section. This use of the word may be due to the wording of the first section of the charter of the city at the time this franchise was drawn.

-City of Red Wing v. Wisconsin-Minnesota Light & Power Co. 243.

"IF IN CASE OF LOSS THE ASSURED IS LIABLE THEREFOR."

See INSURANCE, 9.

"LEARNERS" AND "APPRENTICES."

See MASTER AND SERVANT, 6, 7.

WORDS AND PHRASES-Continued.

"LEVIED" AS USED IN MINNESOTA TAX LAWS HAS DIFFERENT MEANINGS.

See TAXATION, 5.

NET PROFITS.

See Corporation, 1.

WORK AND LABOR.

ACTION FOR COMPENSATION.

- 1. A janitor's wife, while her husband was unable to perform his duties because of a broken leg, did his work for 3 or 4 months with the aid of a boy. The janitor was paid his usual wages for the full time. Subsequently the wife brought this action to recover the reasonable value of her services. Held: The court did not err in leaving it to the jury to determine whether plaintiff did the work with the intention of fulfilling her husband's contract or under circumstances which justified an expectation on her part of compensation from defendant.
 - -Boddy v. Northwestern Realty Co. 497.
- Under an allegation of quantum meruit, plaintiff may recover on proof
 of reasonable value or of an express contract fully performed. The
 admission of an express contract in the reply is not a departure.
 - -Northwestern Marble & Tile Co. v. Swenson, 365.

WORKMEN'S COMPENSATION ACT.

COMPENSATION FOR INJURY AN ITEM OF BUSINESS EXPENSE.

- 1. A basic thought underlying the act is that the business or industry in the first instance shall pay for accidental injuries as a business expense or a part of the cost of production. It may absorb it or it may put it partly or wholly on the consumer if it can.
 - -State ex rel. v. District Court of Hennepin County, 209.

RIGHT TO COMPENSATION CONTRACTUAL.

- 2. The Minnesota Workmen's Compensation Act is elective. By becoming subject to it the employer and employee agree that the employer will pay and the employee receive for an accidental injury the compensation fixed by the statute and that the employee will forego his common-law right of action. It is not important who is at fault or whether any one is. The right to compensation is not based on tort. It is contractual.
 - -State ex rel. v. District Court of Hennepin County, 205.



WORKMEN'S COMPENSATION ACT-Continued.

ACCIDENT ARISING OUT OF EMPLOYMENT.

- 3. When a workman left home in the morning he had no scratch on his hand. He reached home at night about 30 minutes after he quit work and had a scratch on one hand about half an inch long which had been bleeding badly and from which the skin was badly torn. The hand was wrapped in a handkerchief which was bloody and the blood was hard. His work was loading and unloading bags into box cars. He worked two days more and on the second day blood poisoning had set in. He died a week later. Held: The evidence was sufficient to sustain a finding that a deceased workman died from blood poisoning as a result of an injury arising out of and in the course of his employment.
 - -State ex rel. v. District Court of Hennepin County, 30.
- The evidence sustains the finding that the death of plaintiff's husband resulted from injuries which he sustained while engaged in the performance of his duties.
 - -State ex rel. District Court of Hennepin County, 409.

PRESUMPTION THAT SURVIVING WIFE IS DEPENDENT.

- 5. The provision in the compensation law that the surviving wife shall be conclusively presumed to be wholly dependent upon her husband infringed no constitutional right of the relator and is valid.
 - -State ex rel. v. District Court of Hennepin County, 409.

WIFE LIVING APART FROM HUSBAND.

- 6. Evidence that her husband threatened her life, ordered her to leave and drove her away with a gun, and that the wife left and lived apart from him for 12 years solely because she was in fear of personal violence, fails to show that she was doing so voluntarily within the meaning of the statute.
 - -State ex rel. v. District Court of Hennepin County, 409, 412.

ACCIDENT OUTSIDE OF MINNESOTA.

7. The relator's husband was a resident of North Dakota. He entered into a contract of employment with a Minnesota corporation doing a grain brokerage business in Minnesota and having its place of business in Minneapolis and so far as appears none elsewhere. The contract was made there. It contemplated that he should solicit business for the corporation in Minnesota, North Dakota and elsewhere. An automobile was furnished him for use in his work. While using it in the course of his employment it accidentally over-

WORKMEN'S COMPENSATION ACT-Continued.

turned at a point in North Dakota and he was killed. Under these facts it is held that the Minnesota compensation act is applicable and an award of compensation should be made.

-State ex rel. v. District Court of Hennepin County, 205.

ALLOWANCE FOR BURIAL.

- The evidence justified the allowance of \$100 made for last sickness and burial.
 - -State ex rel. v. District Court of Hennepin County, 409.

WHAT IS REVIEWABLE UPON CERTIORARI.

- 9. The writ of certiorari does not bring to this court for review orders in a compensation proceeding not in their nature appealable. It does not lie to review an order for judgment on the pleadings, for such an order is not in its nature appealable. It lies to review the judgment entered pursuant to such an order.
 - -State ex rel. v. District Court of Hennepin County, 210.

REVIEW ON APPEAL.

- 10. The statute contemplates the review of questions of law in the administration of the Workmen's Compensation Act by certiorari. G. S. 1913, § 8225. It does not intend the review by certiorari or orders and judgments not in their nature appealable under our practice. An order for judgment on the pleadings has been held not appealable.
 - -State ex rel. v. District Court of Hennepin County, 210.
- 11. Proceedings under the compensation law are informal and are intended to be inexpensive; and only extraordinary circumstances will justify the allowance of an attorney's lien for any considerable part of the amount awarded.
 - -State ex rel. v. District Court of Hennepin County, 409.

WRIT.

OF CERTIORARI.

See Workmen's Compensation Act, 9, 10.

OF INJUNCTION.

See Good WILL, 3: INJUNCTION: MASTER AND SERVANT, 8.

OF MANDAMUS.

See School and School District. 1.

[END OF VOLUME]

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